102 FERC ¶ 61,054
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Islander East Pipeline Co. Docket Nos. CP01-384-002
CP01-385-002
CP01-386-002

Algonquin Gas Transmission Co. CP01-387-002

ORDER ON REHEARING

(Issued January 17, 2003)

1. On September 19, 2002, the Commission issued a final order in this proceeding granting the requests of Islander East Pipeline Co. (Islander East) and Algonquin Gas Transmission Company (Algonquin) for authorization to construct and operate a new interstate pipeline to transport gas in Connecticut and Long Island.[1] Requests for rehearing were filed by Town of North Branford, Connecticut (North Branford); the Connecticut Attorney General (Connecticut AG); the Town of Branford, Connecticut, the Branford Land Trust, Edward M. Kennedy, Jr., and Gina Rivezzi (jointly Branford); and Algonquin.[2] Additionally, numerous parties and individuals filed comments on the September 19 order and the final Environmental Impact Statement (EIS) issued in this proceeding. As discussed below, the requests for rehearing filed by North Branford, Branford, and the Connecticut AG are denied. Algonquin's request for rehearing is granted. Filed comments are also addressed below.

I. Background

2. Islander East proposes to construct and operate a pipeline that will extend from an interconnection with Algonquin's existing C-System near North Haven, Connecticut,

---

[1]Islander East Pipeline Company, L.L.C. (Islander East), 100 FERC ¶ 61,276 (2002).

[2]The Connecticut Commissioner of Environmental Protection (Connecticut DEP Commissioner) also filed a motion to intervene out-of-time and a request for rehearing.

across Long Island Sound and terminate near Brookhaven, New York on Long Island.[3] The new facilities will transport 260,000 Dth per day of natural gas on a firm basis to markets on Long Island, New York.[4] As part of the Islander East project, Islander East intends to lease certain facilities on Algonquin's C-System. Algonquin proposes to construct a new compressor station and other facilities to increase the capacity on its C-System to provide the service under the lease.

3. On December 21, 2001, the Commission issued a preliminary determination that found Islander East's proposal, subject to the environmental analysis, was in the public convenience and necessity.[5] On August 21, 2002, the Commission issued the Islander East Project final Environmental Impact Statement (EIS).[6] The final EIS, among other things, determined that there was an alternative, the ELI System Alternative, that was environmentally preferable because it had a shorter Long Island Sound crossing, avoided more shellfish leases, and would only have air quality and noise impacts onshore in Connecticut. The ELI System Alternative was based on a modification of the Eastern Long Island Extension Project (ELI Project)[7] that was proposed by Iroquois Gas

---

[3]See Islander East, 97 FERC ¶ 61,363 (2001) for a more detailed description of the proposed project.

[4]Islander East's facilities are designed to transport the design capacity of 260,000 Dth per day on a firm daily basis and up to 285,000 Dth per day depending on actual conditions on Algonquin's C-System. See Islander East, 97 FERC at 62,698-99.

[5]Islander East, 97 FERC ¶ 61,363.

[6]The U.S. Environmental Protection Agency published a notice of availability of the EIS in the Federal Register on August 30, 2002.

[7]The ELI System Alternative includes the proposed ELI Project facilities, including the Milford Compressor Station, the route for crossing Long Island Sound and onshore portions in New York. The ELI System Alternative would also include an additional 10,000 hp to Iroquois' Brookfield Compressor Station and 5.6 miles of pipeline lateral equivalent to the Calverton Lateral proposed by Islander East. Iroquois' existing mainline facility currently crosses Long Island Sound. In essence, the ELI System Alternative will eliminate the need to construct facilities at the Connecticut shoreline.

Transmission System, L.P. (Iroquois) in Docket No. CP02-52-000.[8] However, the final EIS also determined that if the Islander East Project is constructed and operated as proposed by Islander East and Algonquin and in accordance with the recommended mitigation measures, it would be an environmentally acceptable action.

4. On September 19, 2002, the Commission issued an order on rehearing of the December 21 preliminary determination and a final order issuing Islander East and Algonquin authorization to construct their respective facilities. In the September 19 order, the Commission determined that while the final EIS found that the ELI System Alternative was environmentally preferable, the Commission's primary obligation under the NGA required that the Commission consider other factors to determine if the project was in the public convenience and necessity. First, as set forth in the December 21 Preliminary Determination, the proposed Islander East Project satisfies the non-environmental criteria of the Policy Statement[9] for determining whether the proposed project is required by the pubic convenience and necessity.

5. In the September 19 order, the Commission also pointed out that the Islander East Project provided significant benefits that the ELI Project (and, similarly, the ELI System Alternative) did not. First, Iroquois is currently the only pipeline that provides direct access to Long Island. The proposed Islander East Project will provide Long Island with another source of supply, allowing this market to enjoy the benefits of pipeline-to-pipeline competition for the first time. More importantly, the September 19 order stated the proposed Islander East project will provide much needed security and reliability by providing a second facility to access supply in the event something happens to either of the pipeline facilities. Iroquois' proposed ELI Projeet (and the modified ELI System

---

[8]On September 19, 2002, the Commission also issued a Preliminary Determination in that proceeding. See Iroquois Gas Transmission System, L.P., 100 FERC ¶ 61,275 (2002). Subsequently, on October 4, 2002, Iroquois filed a motion requesting that the Commission defer consideration of its application in Docket No. CP02-52-000, among other things, to allow time for market participants to consider and assess the "likelihood that the Islander East Project can promptly obtain the various other federal, state and local permits that are prerequisites for the construction of that project." Iroquois' motion to defer at 2. In response, the Director of the Office of Energy Projects granted the deferral and required that Iroquois file a status report on its plans to proceed with its proposed ELI Project by January 31, 2003.

[9]Certification of New Interstate Natural Gas Pipeline Facilities (Policy Statement), 88 FERC ¶ 61,227 (1999), orders clarifying statement of policy, 90 FERC ¶ 61,128 and 92 FERC ¶ 61,094 (2000).

Alternative) cannot provide similar benefits.[10] Therefore, in the September 19 order, the Commission concluded that because the Islander East Project was an environmentally acceptable action and because it would provide significant benefits, it was required by the public convenience and necessity under the NGA.

6. The September 19 order also addressed several motions to consolidate the Islander East proceeding with Iroquois' ELI Project proceeding and addressed the impact of the Connecticut moratorium on the issuance of the Commission's September 19 order.[11] Concerning the requests for consolidation, the Commission found that the projects were not mutually exclusive under Ashbacker Radio Corp. v. FCC (Ashbacker),[12] and did not require that the Commission conduct a comparative hearing.

7. The Commission stated in its September 19 order that if it did not issue the certificates at that time, it would have abdicated its responsibility to expedite necessary pipeline infrastructure to supply the future market needs of Long Island consumers. The Commission pointed out that while circumstances may develop such that Islander East cannot commence the service proposed on the currently projected timetable, it is not in the public interest to make that possibility a certainty by failing to move forward in this proceeding in a timely manner.

II. Procedural Matters

A. Filings

8. Numerous parties filed comments on the final EIS and the Commission's September 19 order. Algonquin, the Connecticut AG, North Branford, and Branford filed requests for rehearing. North Branford concurs with the Connecticut AG's request for rehearing. Branford adopts and incorporates by reference the arguments made by the Connecticut AG in its rehearing request. The Branford Land Trust, in addition to being a joint party in Branford's request for rehearing, separately filed a response with additional

---

[10]Islander East, 100 FERC at para. 56.

[11]On April 12, 2002, the Governor of Connecticut issued Executive Order No. 26 that prohibits state agencies from approving any utility projects that cross Long Island Sound, among other things, until June 15, 2003. Similarly, on June 3, 2002, the Connecticut Legislature enacted Public Act No. 02-95, which imposed a one-year moratorium on utility crossings in Long Island Sound.

[12]326 U.S. 327, 329-31 (1945).

comments on the September 19 order. The Connecticut Commissioner of the Department of Environmental Protection (Connecticut DEP Commissioner) filed a motion to intervene out-of-time and a request for rehearing.

9. Islander East filed a motion for leave to file a reply and a reply to the requests for rehearing. While our rules do not permit answers to rehearing requests,[13] we may, for good cause, waive a rule.[14] We find good cause to do so in this instance. To ensure a complete and accurate record, we will accept Islander East's answer. Additionally, we note that on December 11, 2002, Islander East filed supplemental material that updated its agency consultations and correspondence related to the Islander East Project. Among other things, the filing includes Islander East's responses to a comment letter filed by the U.S. Environmental Protection Agency (EPA) on September 30, 2002, in response to the final EIS requesting further information concerning the Islander East Project.

10. On November 25, 2002, the Connecticut AG filed a motion for a stay of the Commission's September 19 order. On December 9, 2002, Islander East filed a reply to the Connecticut AG's motion. On December 13, 2002, Brookhaven Energy Limited Partnership filed an opposition to the motion. The motion for a stay is discussed below.

B. Late Intervention

11. The Connecticut DEP Commissioner argues that good cause exists to grant its motion for late intervention because the September 19 order is unprecedented and substantially interferes with the environmental review and permit process under the Coastal Zone Management Act (CZMA) and Clean Water Act (CWA). It contends its intervention will not disrupt the proceeding because the issuance of a CZMA permit is a condition precedent to Islander East's ability to commence construction. It also states that its interest cannot be adequately represented by any other party because it is empowered to issue the CZMA permit.

12. The Connecticut DEP Commissioner also claims that granting late intervention will not prejudice others because the Commission's action in the September 19 order is legally unsupportable. Finally, it asserts that the September 19 order is the first definitive notice that the Connecticut DEP Commissioner received respecting the Commission's disposition towards its coastal consistency determination and that under the

---

[13] See 19 C.F.R. § 385.213(a)(2).

[14] See 19 C.F.R. § 385.101(e).

Administrative Procedure Act federal agencies must provide notice and opportunity for parties to be heard on substantive issues that potentially affect those parties.

13. In response, Islander East asserts that Commission precedent makes clear that when late intervention is sought after the issuance of a Commission order, "the prejudice to other parties and burden upon the Commission of granting late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention."[15] Islander East contends that the Connecticut DEP Commissioner has not met this higher burden. It argues that the Connecticut DEP Commissioner has failed to raise any valid arguments as to why its motion to intervene should be granted despite its extreme lateness.

14. Islander East claims that the Connecticut DEP Commissioner's actions in this proceeding establish that it had notice long ago that its interests could be affected in this proceeding. Islander East points out that the Connecticut DEP Commissioner sought to protect those interests by filing comments on the draft EIS months ago, on May 17, 2002, thereby demonstrating that the Connecticut DEP Commissioner has had ample notice and opportunity to participate in this proceeding in a timely fashion.

15. Further, Islander East contends that there is no indication that the Connecticut DEP Commissioner's interests have not been adequately represented by other participants and parties to this proceeding. It states that in the motion, the Connecticut DEP Commissioner acknowledged that the Connecticut AG, which has already intervened in this proceeding, acts as the legal representative for Connecticut's executive branch agencies, including the Connecticut DEP Commissioner, and that the only way for the Connecticut DEP Commissioner to participate in this proceeding is through the Connecticut AG. Therefore, Islander East argues that the Connecticut DEP Commissioner has failed to demonstrate that its interests are not adequately represented by other parties.

16. Islander East also asserts that granting the request for late intervention for the purpose of requesting rehearing will disrupt the proceeding and place additional burdens on Islander East, the Commission, and the other parties to the proceeding. It contends that permitting the late intervention would effectively permit the Connecticut AG to enter the proceeding twice, thereby sanctioning an attempt to manipulate the Commission processes to its own advantage, which is highly prejudicial to other parties.

---

[15] Citing Islander East, 100 FERC at para. 11, citing North Baja Pipeline L.L.C., 99 FERC ¶ 61,028 at 61,109-10 (2002).

Finally, Islander East states that allowing the Connecticut DEP Commissioner party status in this proceeding at this late juncture, and thus affording it standing to pursue an appeal of the Commission's certificate order in federal court, would be highly prejudicial to Islander East because it could unduly delay the proceeding and Islander East's ability to serve its customers on a timely basis.

Commission Response

17. As Islander East points out, when late intervention is sought after the issuance of a Commission order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention.[16] The Connecticut DEP Commissioner contends that good cause exists to grant its motion because the September 19 order is legally unsupportable, unprecedented, and interferes with the Connecticut DEP Commissioner's CMZA permit process.

18. The Commission routinely issues certificates for natural gas pipelines subject to the states' issuing CZMA permits.[17] In fact, in a case involving Connecticut in 1990, the Commission authorized Iroquois to construct its pipeline through Connecticut across Long Island Sound conditioned on it filing proof that the responsible Connecticut agency concurred that the proposed facilities were consistent with its coastal zone management program.[18] Consequently, the Commission's action in the September 19 order is not unprecedented and does not interfere with the Connecticut DEP Commissioner's permitting process. Accordingly, we find that the Connecticut DEP Commissioner had sufficient notice and opportunity to intervene in a timely manner and has failed to demonstrate good cause to justify its request for late intervention. Therefore, its motion to intervene out-of-time is denied.

19. Islander East argues that if the Commission denies the motion for late intervention it must dismiss the Connecticut DEP Commissioner's request for rehearing. Because the Connecticut DEP Commissioner is not a party to the proceeding under Rule 102 of the

---

[16]See North Baja Pipeline L.L.C., 99 FERC at 61,109-10.

[17]See, e.g., Gulfstream Natural Gas System, L.L.C., 94 FERC ¶ 61,185 (2001); Florida Gas Transmission System, 90 FERC ¶ 61,212 (2000); Iroquois Gas Transmission System, L.P. (Iroquois), 52 FERC ¶ 61,091 (1990).

[18]Iroquois, 52 FERC at 61,454, Environmental Condition 48.

Commission's regulations, it cannot request rehearing. However, we will address the concerns raised by the Connecticut DEP Commissioner as a request for reconsideration.

C. Request for Stay

20. On November 25, 2002, the Connecticut AG filed a motion for a stay of the September 19 order. Generally, it argues that recent rulings by the Commission and other state and federal agencies have had the effect of extending the administrative review process. Therefore, it contends that a stay is appropriate in order to preserve the status quo pending review, to prevent possible damage to important natural resources, and to avoid imposing unnecessary costs to the public as well as to Islander East.

21. Specifically, the Connecticut AG states that there are at least four active or potential administrative proceedings pending. It contends that these include a CWA permit from the Connecticut DEP, an appeal of the coastal consistency denial to the United States Department of Commerce under the CZMA, future section 10 and 404 permit proceedings before the United States Army Corps of Engineers (COE), and a final rehearing determination from the Commission. It argues that any of these proceedings may result in extensive, post-administrative judicial review and that all permits must be obtained before the project is complete. Therefore, the Connecticut AG concludes that, as a consequence, it is clear that there will not be any substantive work in or under the Long Island Sound, or in or around critical inland wetland area, for an extended period of time, possibly years.

22. The Connecticut AG states that Islander East has notified the COE and several Connecticut citizens living along the proposed route that it intends to begin construction of the facilities on land during the Spring of 2003. The Connecticut AG states that the letters indicate that Islander East plans to employ its eminent domain authority to seize private land to begin work on the areas not within the Sound or existing wetlands.

23. The Connecticut AG alleges that it is premature for the private utility to commence construction without all regulatory approvals in place. It argues that once construction begins, not only does the company begin to incur substantial costs, but will also require that landowners incur irreversible and substantial impacts to their property. The Connecticut AG states that without a stay, the full adverse affects may be imposed on the private homeowners long before the various state and federal authorities have completed their deliberations. The Connecticut AG contends that if one or more of the administrative or judicial authorities concludes that an environmentally preferable alternative exists to the proposed route, or otherwise determines not to approve "a project that permanently alters approximately 20 miles of seafloor and disturbs more than

500,000 cubic yard of sediment some of which is contaminated with pesticides and other toxic substances,"[19] such a determination will come too late for homeowners, who will have suffered serious disruption of their property.

24. The Connecticut AG also argues that state and federal law uniformly recognizes the importance of preserving real property rights. It contends that the power of eminent domain should never be used carelessly or unnecessarily. It asserts that there can be no credible justification for permitting a private company to use federal power to seize private property rights when it is doubtful, at best, that the proposed project will ever go forward.

25. In response, Islander East states that the Connecticut AG's motion is a request for extraordinary relief that is completely unsupported by fact or law and should be denied. It asserts that the Connecticut AG has not proved that it will suffer irreparable harm if the stay is denied. Islander East contends that the Connecticut AG has not presented any factual information suggesting that any legitimate interest of the State of Connecticut will if fact suffer an irreparable injury. It argues that while the Connecticut AG states that a stay of the order is appropriate until the administrative review is completed and the appropriate permits are received, it also points out that the Connecticut AG also recognizes that Islander East cannot work in or around Long Island Sound until it obtains the necessary permits. Therefore, Islander East claims that the Connecticut AG virtually concedes the absence of harm to property owned or held in trust by the state in absence of a stay.

26. Islander East argues that lacking a basis to argue that any legitimate interest of the State of Connecticut will be irreparably harmed, the Connecticut AG instead claims that private landowners will be irreparably injured. Islander East contends that even assuming, for argument sake, that the Connecticut AG could legally and legitimately assert harm to private landowners to support of its claim,[20] it has failed to specify what harm is likely to occur before the permits are issued, or even to identify the landowners who will be harmed. Islander East points out that the Commission order makes it clear that Islander East cannot proceed with construction of this project, including construction

---

[19]Connecticut AG's motion for stay, at 4.

[20]Citing Iroquois Gas Transmission System, L.P., 54 FERC ¶ 61,103 at 61,341-42 (1991)(The Commission has held that "movant may not seek a stay based on injury suffered by a party other than the movant.")

on private property, until it has received necessary and appropriate permits.[21] Further, Islander East points out that while it continues to plan to begin construction of the pipeline sometime during the spring of 2003, it recognizes that it cannot begin such construction before it receives the appropriate permits.

27. Islander East states that as permitted by the September 19 order, in the period prior to construction it is attempting to conduct engineering, environmental, and archeological surveys along its certificated route for the limited purpose of determining if minor deviations in the certificate route might be needed due to environmental or archeological conditions. It contends that such surveys are unlikely to damage property and would accordingly provide no basis for the Connecticut AG's claim that private property owners will suffer irreparable harm in the absence of a stay.

28. Islander East asserts that granting a stay would substantially harm Islander East, its shippers, and potential consumers in Long Island, Connecticut, and New York. It states that it is making every effort to complete the project so service can begin by November 2003, if it receives all necessary permits in time to make that feasible. It contends that the size and complexity of the project require substantial advance planning. Islander East states that if it is to have an opportunity to meet is goal of commencing construction during the spring of 2003 (assuming the appropriate permits have been obtained), it needs to conduct its preliminary surveys and prepare its reports now. Islander East claims that it needs the September 19 order to obtain access to the few remaining properties where access has been denied so that it can compete the surveys and reports.[22] It contends that a stay would prevent Islander East from completing this essential preliminary work and unreasonably delay the project for no apparent reason.

29. Islander East also argues that the stay would not serve the public interest. It state that after conducing an extensive review, the Commission found that there is a real need for the Islander East project and concluded that it is required by the public convenience and necessity. Islander East also states that the Commission rejected the prior attempts by the Connecticut AG and others to delay or deny the issuance of the certificate. It contends that nothing has changed since the time the Commission issued the order. Therefore, Islander East asserts that a stay would not serve the public interest, but would

---

[21] Citing Environmental Condition 42 and 43.

[22] Citing Iroquois Gas Transmission System, L.P., 52 FERC at 61,402 n.195 (The Commission has recognized that, in many instances, as in this case, a pipeline cannot obtain access to property to complete the detailed cultural resource field work needed by the National Historic Preservation Act until it has a certificate.)

instead make it more difficult for Islander East to complete the project on a timely basis so that it can provide much needed supplies to Long Island and New York. Islander East concludes that the Connecticut AG has failed to establish that the interest of the state or private Connecticut landowners would be irreparably harmed in the absence of a stay and, in contrast, that there is clear evidence that a stay will irreparably harm Islander East, its shippers, and potential customers. Therefore, it contends that the Commission should deny the motion for a stay.

30. In its opposition, Brookhaven states that the Connecticut AG's request for a stay must be rejected because it may cause substantial irreparable injury to all residents on Long Island. It states that the Islander East Project will benefit consumers on Long Island by providing a reliable source of natural gas deliveries for competitive prices required for the development of Brookhaven's 580 MW gas-fired generation facility. Brookhaven asserts that to the extent the stay results in delaying the completion of the Islander East Project, consumers on Long Island will be deprived of the benefits of its Brookhaven Energy Facility, including projected reductions of harmful emissions of nitrogen oxides and sulfur dioxide on Long Island of approximately 1,283 tons per year and 678 tons per year, respectively. It also states that the generation facility will reduce the cost of electricity on Long Island by approximately $61 million per year.

Commission Response

31. In its consideration of motions for a stay, the Commission applies the standards set forth in Section 705 of the Administrative Procedure Act,[23] and grants a stay when "justice so requires."[24] In deciding whether justice requires a stay, the Commission generally considers several factors, which typically include: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest.[25]

---

[23]5 U.S.C. § 705.

[24]See, e.g., Clifton Power Corp., 58 FERC ¶ 61,094 (1992); United Gas Pipe Line Co., 42 FERC ¶ 61,388 (1988); Trinity River Authority of Texas, 41 FERC ¶ 61,300 (1987); City of Centralia, Washington, 41 FERC ¶ 61,028 (1987).

[25]See, e.g., CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership, 56 FERC ¶ 61,177 at 61,631 (1991), aff'd sub nom., Michigan Municipal Cooperative Group v. FERC, 990 F.2d 1377 (D.C. Cir.), cert denied., 510 U.S. 990 (1993); NE Hub Partners, L.P., 85 FERC ¶ 61,105 (1998); Boston Edison Company,

(continued...)

The Commission's general policy is to refrain from granting stays of its orders, in order to assure definiteness and finality in Commission proceedings.[26] If the party requesting a stay is unable to demonstrate that it will suffer irreparable harm absent a stay, the Commission need not examine the other factors.[27]

32. Further, in Wisconsin Gas v. FERC (Wisconsin Gas)[28] the court developed several principles to determine if the requirement of irreparable harm has been met for a judicial stay:

> First, the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time." It is also well settled that economic loss does not, in and of itself, constitute irreparable harm. . . . Implicit in each of these principles is the further requirement that the movant substantiate the claim that irreparable injury is "likely" to occur. Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.[29]

33. We find that the Connecticut AG has not shown irreparable injury. First, as Islander East points out, it cannot commence construction of the facilities until it receives all necessary federal permits, including federal permits issued by the State through its delegated authority.

34. Further, easement agreements negotiations and condemnation proceedings are lengthy procedures. One of the reasons the Commission issued the September 19 order was to give Islander East sufficient time to conduct preconstruction activities, including acquiring the necessary easements. Staying Islander East's right to eminent domain while

---

[25](...continued)
81 FERC ¶ 61,102 (1997).

[26]Id. at 61,630. See also, Sea Robin Pipeline Company, 92 FERC ¶ 61,217 (2000).

[27]Id.

[28]Wisconsin Gas v. FERC, 758 F.2d 669 (D.C. Cir 1985).

[29]Id. at 674 (citations omitted).

it resolves preconstruction environmental conditions would needlessly delay the project. Moreover, any economic losses due to eminent domain proceedings, is not sufficient to constitute irreparable harm. Any potential court costs are speculative depending on Islander East's success and/or failure with its easement negotiations. Additionally, the Connecticut AG has not provided any proof of damages that may be associated with denying this stay and why those damages will not be recovered. To what extent landowners may incur costs or damages in condemnation proceedings is an issue that is determined by state law. Accordingly, we find that the Connecticut AG has not demonstrated that it will suffer any irreparable injury.[30] Therefore, its request for a stay is denied.

III. Discussion

A. Rehearing Issues

1. Algonquin Lease Issues

35. Section 1.3 of the Lease Agreement between Algonquin and Islander East reserves to Algonquin the right to use the lease capacity to the extent it is not used by Islander East, by making it available under Algonquin's open access tariff.[31] In a footnote in the Preliminary Determination, the Commission pointed out that at the termination of the lease agreement Islander East would need to file for authorization to abandon the leased capacity and Algonquin would need to apply for a certificate to reacquire the capacity. On rehearing, Algonquin requested that the Commission clarify that the imposition of such requirements did not prohibit Algonquin from offering that capacity for use under its open access tariff during the term of the lease to the extent Islander East did not fully use it.

36. In the September 19 order, the Commission stated that a lease was an acquisition of a property interest and that any available capacity is subject to the capacity release requirements of the lessee's tariff. Therefore, Algonquin does not have any rights to use

---

[30]Additionally, as Islander East points out, the injury must be an injury to the moving party. See at Iroquois, 54 FERC at 61,341-42.

[31]Specifically, Section 1.3 of the Lease Agreement states, among other things, that "[s]ubject to Islander East's rights, . . . Algonquin shall have the right to utilize for secondary firm or interruptible service any capacity in the C-System that is not used by Islander East on a firm or interruptible basis."

the lease capacity for interruptible service. On rehearing, Algonquin states that the Commission erred by imposing new restrictions on the use of the leased capacity.

37. To support its request, Algonquin cites to the Commission's long-standing policy by which a lessor pipeline could provide service through leasehold facilities under its open access tariff to the extent that the lessee pipeline was not using that capacity.[32] It also cites to the Commission's order on remand from the U.S. Court of Appeals from the D.C. Circuit, in response to concerns that permitting pipelines to acquire capacity on other pipelines may lead to anticompetitive or unduly discriminatory behavior.[33] Algonquin states that in that order the Commission stated that adequate protections are in place to protect from such a result because "the acquiring capacity must be subject to the Commission's Open-Access Rules at all times. This means among other things, that unused capacity will be subject to the capacity release provisions of the acquiring pipeline's tariff or may be sold on an interruptible basis by the offsystem [i.e. lessor] pipeline."[34] Algonquin contends that, notwithstanding this precedent, in the September 19 order, the Commission changed this policy without justification or explanation.

38. We find Algonquin's argument persuasive. The Commission believes that allowing Algonquin to use the capacity on an interruptible basis will encourage the efficient use of interstate pipeline facilities. Accordingly, upon reconsideration, we find that under Section 1.3 of the lease agreement, Algonquin may use the available capacity that is not used by Islander East on an interruptible basis. We note that to the extent Algonquin uses any capacity made available on the proposed facilities, it must do so in accordance with its tariff or other Commission authorization. Algonquin's request for rehearing is granted.

2. Incomplete Environmental Review

39. On rehearing, the Connecticut AG asserts that the Commission issued a certificate without completing the necessary environmental studies mandated under NEPA. Therefore, it claims the certificate is premature. The Connecticut AG argues that numerous environmental conditions recognize that significant information has not yet been prepared that would allow for a complete or reasonably accurate picture of the

---

[32]Citing Texas Eastern Transmission Corp., 87 FERC ¶ 61,325 (1999); Columbia Gas Transmission Corp., 78 FERC ¶ 61,030 (1997).

[33]Texas Eastern Transmission Corp., 93 FERC ¶ 61,273 (2000).

[34]Algonquin's rehearing request at 7, quoting Id., at 61,866.

potential environmental impacts to be presented for review. The Connecticut AG specifically refers to the requirement that Islander East conduct further modeling to adequately determine near shore areas that should be monitored for potential sedimentation impacts. The Connecticut AG also cites to other various requirements for additional studies, including studies to determine blasting affects on contaminated groundwater in North Branford and the requirement that Islander East complete Historic Preservation Act investigations and reports. Finally, it cites to the EPA's comments filed on the final EIS. It argues that in view of the numerous effects of this project on the ecosystem of the Long Island Sound and the lack of even basic information, it is premature to certify this project.

40. In response, Islander East states that although the Commission imposed conditions requiring Islander East to conduct additional studies, prepare additional reports and submit information to the Commission, the use of such conditions is fully consistent with the Commission's longstanding practice and requirements of NEPA.[35] It argues that the Commission has rejected claims in other cases that every detail of construction and implementation must be reviewed and approved prior to certification, noting that such an approach would impose "an unnecessary and unreasonable burden that would preclude the timely construction of most major projects."[36] It states that the conditions the Commission has imposed will ensure that, before Islander East can begin construction, it has fully satisfied all the requirements the Commission has found necessary to ensure environmental compliance.

Commission Response

41. Under NEPA, the purpose of an EIS is to ensure that an agency, in reaching its decisions, will have available and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audiences that may also play a role in both the decision making process and the implementation of that decision.[37] The EIS prepared by Commission staff for Islander East sets forth the information necessary to achieve those purposes.

---

[35]Citing Iroquois Gas Transmission System, L.P., 52 FERC ¶ at 61,402 n. 195.

[36]Citing Millennium Pipeline Company, L.P., 100 FERC ¶ 61,277 at para. 144 (2002).

[37]See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

42. Consistent with long-standing practice, and as authorized by NGA section 7(e), the Commission typically issues certificates for natural gas pipelines subject to conditions that must be satisfied by an applicant or others before the grant of a certificate can be effectuated by constructing and operating the nascent project.[38] As is the case with virtually every certificate issued by the Commission that authorizes construction of facilities, the instant approval is subject to Islander East's compliance with the environmental conditions set forth in the order.

43. The practical reality of large projects such as Islander East is that they take considerable time and effort to develop. Perhaps, more importantly, their development is subject to many significant variables whose outcome cannot be predetermined. For example, as is the case in this proceeding, many individuals have denied or limited Islander East's access to property that it needs to complete its surveys and environmental studies. Depending on state law, the pipeline needs NGA section 7 certificate authorization, including eminent domain authority under NGA section 7(h), to access this property.

44. The natural consequence of this is that some aspects of a project may remain in the early stages of planning even as other portions of the project become a reality. If every aspect of the project were required to be finalized before any part of the project could move forward, it would be difficult, if not impossible, to construct the project. Here, the Commission processed Islander East's application and issued it a certificate under the requirements of the NGA and NEPA. The exercise of that authority was conditioned on the pipeline's completing the necessary survey and environmental studies. As such, we find that the final EIS contains sufficient information for the Commission to determine under NEPA that the proposed Islander East Project is an environmentally acceptable action. Therefore, the issuance of a certificate of public convenience and necessity to Islander East to construct and operate the facilities under the NGA is not premature. The Connecticut AG's request for rehearing on this issue is denied.

---

[38]Section 7(e) of the Natural Gas Act provides that "[t]he Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." See also Iroquois Gas Transmission System, L.P., 52 FERC at 61,402 n. 195 (the Commission has a longstanding practice of issuing certificates conditioned on the completion of environmental work or the adherence by the applicants to environmental conditions)(citing Texas Eastern Gas Tranmission Corp., 47 FERC ¶ 61,341 (1989); CNG Transmission Corp. 51 FERC ¶ 61,267 (1990); Columbia Gas Transmission Corp. 48 FERC ¶ 61,050 (1989).

3. Alternatives

45. The Connecticut AG contends the order fails to comply with NEPA and the NGA because it does not include consideration of all reasonably foreseeable alternatives.[39] It states that one of the guiding principles of NEPA is that federal agencies presented with multiple alternatives to accomplish and identified public need must evaluate them rigorously.[40] It contends that much of the information to conduct the analysis does not exist. Specifically, it states that the final EIS fails to consider the proposed Blue Atlantic Pipeline. It contends that Islander East's stated goals to satisfy the natural gas markets on Long Island and to provide greater system reliability, diversity of supply, and increased competition can be met by a number of alternatives that are simply absent from the EIS. Therefore, it claims the document is incomplete.

46. On rehearing, Islander East states that the Commission fully satisfied its responsibilities under NEPA by identifying the reasonable alternatives to the Islander East Project and taking a "hard look" at the environmental effect of approving the project. It points out that the final EIS identified six system alternatives to the Islander East Pipeline Project. It states that the Commission eliminated five of these six alternatives from consideration because they were not reflected in filings pending before the Commission, did not meet the Islander East purpose of enhancing supply diversity and reliability, could not meet the Islander East in-service date of November 1, 2003, and/or did not offer significant environmental benefits. The sixth, the ELI System Alternative, was identified as being environmentally preferable to the Islander East Project, even though this hypothetical system alternative would also require comparatively more compression, resulting in increased noise levels and air emissions.

Commission Response

47. In the September 19 order, citing MidCoast Interstate Transmission Inc. v. FERC (MidCoast),[41] the Commission pointed out that NEPA requires that the Commission identify the reasonable alternatives to the contemplated project and look hard at the

---

[39]Citing Mississippi River Basin Alliance v. Westphal, 230 F.3d 170, 175 (5th Cir. 2000).

[40]Citing Custer County Action Ass's v. Garvey, 256 F.3d 1024, 1039 (10th Cir. 2001).

[41]198 F.3d 960 (D.C. Cir. 2000).

environmental effects of its decision.[42] As Islander East points out, the final EIS contained an extensive analysis of what the Commission staff determined were the foreseeable, reasonable alternatives.

48. The Connecticut AG specifically claims that the alternative analysis is defective because it failed to consider the proposed Blue Atlantic Pipeline. On October 2, 2001, El Paso Corporation (El Paso) announced it plans to develop an approximately 750-mile subsea pipeline from Nova Scotia to New York and New Jersey.[43] El Paso is currently conducting engineering studies for the potential pipeline. As the Connecticut AG points out, much of the information to conduct the analysis presently does not exist. Without additional information, any evaluation of the Blue Atlantic Pipeline would be highly speculative and would lack the detail essential for assessing its impact or conducting a meaningful alternative comparison with other projects. NEPA does not require that the Commission consider potential effects (or alternatives) that are highly speculative or indefinite.[44]

49. Even assuming, for argument sake, the Commission could conduct an analysis of the Blue Atlantic Pipeline, it would not qualify as a reasonable alternative because it cannot meet the purpose of the Islander East Project. As currently proposed, the Blue Atlantic Pipeline will serve markets in New York City. If the pipeline is constructed, it will not be in service until 2005. Further, it is not self evident that a 750-mile subsea pipeline would necessarily offer any significant environmental benefits over the 50-mile Islander East Project, other than the fact that, as presently proposed, it will not be located in Connecticut or Long Island Sound. Finally, we note that pipeline companies consider and analyze potential projects regularly that do not always evolve to fruition. Accordingly, we find that the Blue Atlantic Pipeline is not a reasonable alternative that warranted an analysis in the final EIS. We also find that the final EIS considered all reasonably foreseeable alternatives, as required by NEPA. The Connecticut AG's request for rehearing on this issue is denied.

50. In its request for rehearing, the Connecticut AG cites to three cases to support its contention that the Commission failed to conduct a proper alternative analysis of need

---

[42]Islander East, 100 FERC at para. 98.

[43]See http://www.blueatlantic.net/

[44]See Kleppe v. Sierra Club, 427 U.S. 390 (1976); Sierra Club v. Marsh, 769 F.2d 868 at 878 (1st Cir. 1985).

under NEPA.[45] However, these cases support only the principle that NEPA requires agencies to conduct a rigorous analysis of alternatives, which the Commission did in this case. In each case the courts found that the agencies had satisfied NEPA requirements.[46]

4. ELI System Alternative

51. In the September 19 order, the Commission explained that under the NGA it is required to make decisions concerning the public interests of energy consumers on a national basis. The Commission determined that the proposed Islander East Project was preferable over the ELI System Alternative because it would increase the flexibility and reliability of the interstate pipeline grid by offering greater access to gas supply sources with increased availability of gas for anticipated electric generation projects. Further, it will introduce pipeline-to-pipeline competition to Long Island markets.[47] Subsequently, in explaining the Commission's mandate under the NGA and NEPA the Commission referred to the court's ruling in State of Louisiana v. FPC, that found that NEPA simply adds a secondary responsibility that mandates that the Commission consider the environment in carrying out is statutorily mandated duties.[48]

52. On rehearing, the Connecticut AG contends that the Commission ignored its conclusion that the ELI System Alternative was environmentally preferable and in referring to Commission's reference to the court's ruling in State of Louisiana v. FPC , the Connecticut AG argues that the Commission's "absurd conclusion that NEPA means only that the agency must merely consider the environment while remaining free to ignore its own conclusions is completely unlawful."[49]

53. The Connecticut AG states that NEPA is not a suggestion; it is a federal law and each agency must adhere to its defined procedures. The Connecticut AG argues that

---

[45]Specifically, it cites to Custer County Action Ass'n. v. Garvey (Custer), 256 F.3d 1024 (10th Cir. 2001); Mississippi River Basin Alliance v. Westphal (Mississippi River), 230 F.3d 170 (5th Cir. 2000); and Morongo Band of Mission Indians v. FAA (Morongo), 161 F.3d 569 (9th Cir. 1998).

[46]See Custer, 256 F.3d at 1039; Mississippi River, 230 F.3d at 170; and Morongo 161 F.3d at 575.

[47]Islander East, 100 FERC at para. 74

[48]503 F.2d 844 at 876 (1974).

[49]Connecticut AG's rehearing request, at 12.

NEPA procedures expressly mandate that federal agencies consider the environmental impacts of their projects and consider reasonably foreseeable alternatives in order to further the clearly defined policy to "attain the widest range of beneficial uses of the environment without degradation."[50] The Connecticut AG contends that a comparative evaluation in this case is the only logical means of meeting this requirement and it is arbitrary and capricious not to do so. Similarly, the EPA also questions why the ELI System Alternative was not the preferred alternative.

Commission Response

54. Immediately after citing to the court's decision in State of Louisiana v. FPC, in the September 19 order the Commission also cited to a Supreme Court quote in the Midcoast decision that found that:

> NEPA itself does not mandate particular results, but simply prescribes the necessary process. If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. . . . All that is required is that the agency "identify the reasonable alternatives to the contemplated action" and "look hard at the environmental effects of [its] decision." [51]

55. The order went on to explain that Islander East's application demonstrates, as stated, that its proposed project will provide much needed competition and reliability that the ELI System Alternative and Iroquois' ELI Project cannot. It also stated that the New York Public Service Commission (PSC) prefers the Islander East Project because it will provide another source of delivery to Long Island. Moreover, the order pointed out that the final EIS determines that Islander East's proposed project is an environmentally acceptable action. Therefore, the Commission determined that the public convenience and necessity require that the Islander East's project be approved.

56. It appears that the Connecticut AG is confusing the Commission's mandate under the NGA with the procedural requirements of NEPA. In certificate proceedings, the

---

[50]Citing 42 U.S.C. § 4331.

[51]Midcoast Interstate Transmission v. FERC, 198 F.3d at 967 (2000), citing, Robertson v. Methow Valley Citizens Council, 490 U.S. 332 at 350 (1989) and Corridor H Alternatives, Inc. v. Slater, 166 F.3d 368 at 374 (D.C. Cir. 1999).

Commission's primary responsibility under the NGA is to determine if the proposed facilities are required by the public convenience and necessity. The term public convenience and necessity connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination.[52] The Commission's obligation is to weigh all relevant factors in exercising its responsibilities under the NGA. A flat rule making one factor dispositive in the certificate decision is contrary to the Commission's responsibility to consider and balance all relevant factors.[53] Thus, although the final EIS finds, solely from an environmental standpoint, that the ELI System Alternative is the preferred environmental alternative to Islander East's proposal, that factor is not the end of our inquiry into the public convenience and necessity.[54]

57. The Court of Appeals for the District of Columbia Circuit stated that:

> NEPA's requirements are essentially procedural; as long as the agency's decision is fully informed and well-considered, it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment. Nevertheless, the court should ensure that the statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a hard look at environmental factors, and to make a reasoned decision.[55]

NEPA does not mandate a particular result. Therefore, it does not automatically require that the Commission certificate the environmentally preferred alternative. The environmental analysis conducted in the final EIS is neither the end of the Commission's inquiry into the public convenience and necessity under the NGA nor an impediment preventing it from issuing Islander East a final certificate for the proposed route.

58. As discussed in the September 19 order, the Commission prepared an EIS to identify the reasonable alternatives to Islander East's proposal and to look hard at the environmental effects of approving that project. The final EIS determined that although

---

[52]FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 23 (1961).

[53]Id. at 23-24.

[54]See City of Pittsburgh v. FPC, 237 F.2d 741 at 751 n.28 (D.C. Cir. 1956).

[55]National Resources Defense Council, Inc. v. Hodel, 865 F.2d 288, 294 (D.C. Cir. 1988) (quotations and citations omitted).

there was an environmentally preferable alternative, Islander East's project would be an environmentally acceptable action under NEPA, if constructed and operated in accordance with the recommended mitigation measures. The Commission conditioned its certificate authorization on Islander East's compliance with the mitigation measures in the final EIS, as well as other measures discussed in the September 19 order.

59. Based on that conclusion, the Commission balanced the environmental impact of the proposed projects along with all the other relevant factors that it looks at in exercising its review under the NGA. As stated in the September 19 order, under the NGA, the Commission is required to make decisions concerning the public interests of energy consumers on a national basis. The proposed Islander East and Algonquin Projects increase the flexibility and reliability of the interstate pipeline grid by offering greater access to gas supply sources with increased availability of gas for anticipated electric generation projects. Further, it will introduce pipeline-to-pipeline competition to eastern Long Island markets.[56] In approving the proposed pipeline, the Commission also reviewed the precedent agreements filed by Islander East and various market studies to determine that there was sufficient long and short-term market demand to support to proposed project. Additionally, in the December 21 Preliminary Determination, the Commission determined that the proposed Islander East Project is consistent with the Policy Statement's criteria.

60. We also note that while the final EIS determined that the ELI System Alternative was environmentally preferable, it is a hypothetical pipeline with no pending application

---

[56]In Midcoast, the court specifically upheld the Commission's policy of promoting competition. The court found that the Commission:

> was entitled to take competition into consideration in determining whether to approve Southern's certificate application. The agency had developed a long-standing policy of favoring competition in natural gas markets, and it had identified the benefits that it believed competition throughout that market would afford consumers, and adopted industry-transforming rules aimed at securing them. [The Commission] was entitled to rely on the general economic theory that introduction of competition to the market will benefit consumers. 198 F.3d at 968, citing Kansas Power and Light Co. v. FERC, 891 F.2d 939, 942 (D.C. Cir. 1989) and Associated Gas Distribs. v. FERC, 824 F.2d 981, 1008-09 (D.C. Cir 1987)("Agencies do not need to conduct experiments in order to rely on . . . predictions that competition will normally lead to lower prices.")

before the Commission.[57] Further, it does not meet the pipeline goals of providing flexibility and reliability. As a general matter, the Commission usually determines that an alternative that cannot meet the proposed project's stated objectives is not a viable alternative. It is not unreasonable for the Commission to reject an alternative because it did not meet the objectives of a project.[58]

61. The Commission also reviewed the filings made by Islander East's proposed customers and the New York PSC emphasizing the need for a totally separate sound crossing to provide contingency protection for both gas and electric systems against a total loss of supply if damage were to occur to the Iroquois line. As stressed in the September 19 order, KeySpan alone currently serves approximately 1.8 million customers, most of whom are residential and small commercial customers who use natural gas for life sustaining uses such as heating and cooking. Any disruption of existing firm service from Iroquois for any significant period could require KeySpan to curtail service to approximately 124,000 customers on Eastern Long Island. Such curtailments would have a significant and possibly disastrous impact.

62. Accordingly, after taking the hard look required by NEPA, the Commission concluded, under the NGA, that the other values of the proposed project outweighed what the final EIS described as the project's limited, but acceptable, environmental costs. As such, it determined that, under the NGA, it was required by the public convenience and necessity to approve the Islander East project. The Connecticut AG's request for rehearing on this issue is denied.

5. Consolidation/Competition Arguments

a. Connecticut AG's

63. In the September 19 order, the Commission determined, after doing an analysis under Ashbacker Radio Corp. v. FCC (Ashbacker),[59] that the Islander East and Iroquois ELI Projects were not mutually exclusive and did not require that the Commission conduct an Ashbacker hearing. The order also stated that NEPA's requirement of alternative analysis, by itself, does not trigger a comparative hearing.

---

[57] See supra n.6.

[58] See e.g., City of Alexandria, Virginia v. DOT, 198 F.3d 862 (D.C. Cir. 1999).

[59] 326 U.S. 327, 329-31 (1945).

64. On rehearing, the Connecticut AG contends that it appears that the primary reason that the Commission has decided not to consolidate the proceeding or perform a comparative project analysis is that the Commission believes that this course will foster competition and allow the market and not government regulators to decide which project is best. The Connecticut AG states that "not only does the Commission violate and ignore NEPA by failing to provide a full environmental impact and alternatives analysis, but, by approving Islander East without a valid comparison analysis under the NGA, the Commission is actually subverting the market by approving the first, and worst, project before it."

65. The Connecticut AG claims that the record shows that this action will result in the demise of a competitor's better alternative which is merely a few months behind in the regulatory process and effectively denies the public the opportunity to exercise any choice, and actively interferes with the proper functioning of the market. The Connecticut AG challenges the Commission's conclusion that the Iroquois and Islander East projects will serve different shippers and that the market is sufficient to approve both projects. It contends that the Commission erred because there is unchallenged evidence in the record that Iroquois will not construct its pipeline if Islander East builds its project. Therefore, the Connecticut AG concludes that the two projects are mutually exclusive and in no circumstances will both be completed.

66. The Connecticut AG concludes that the Commission has effectively forced Iroquois out of the playing field and denied it any review. It argues that the fact that Iroquois requested deferral of its project because of the Commission's action reinforces its argument. It also argues that as a practical matter, the Commission intruded into the marketplace and arbitrarily designated the first project in line as the only one to be built. Additionally, the Connecticut AG claims that by failing to consider the ELI System Alternative as a viable project alternative, the Commission has effectively designated what its own staff acknowledges is the most destructive proposal as the preferred proposal.

67. In response, Islander East states that the Ashbacker doctrine only requires the Commission to hold a comparative hearing when two bona fide applications would in fact be mutually exclusive. It asserts that the Commission properly concluded that the Islander East and Iroquois ELI Projects were not mutually exclusive. It also contends that, contrary to the Connecticut AG's assertion, the D.C. Circuit has held that the fact that a pipeline may be at an economic disadvantage because another pipeline filed its application first and was certificated earlier would not make the Ashbacker doctrine

applicable.[60] It also asserts that, contrary to the Connecticut AG's claim that the Commission erred in its decision to allow the market to determine which of the projects are best suited to serve a particular area, the court also stated that it did not understand how the Commission could determine the public interest without taking market forces into account.[61]

Commission Response

68. In the September 19 order, the Commission extensively compared the facts in this proceeding to those in the ANR Pipeline Co. (ANR) proceeding that was affirmed by the court in ANR Pipeline Co. v. FERC.[62] On rehearing, the Connecticut AG does not provide any legal analysis or evidence that contests the Commission's reliance on that case for support here. It does not distinguish the facts in this proceeding from those in ANR. Nor does it explain why the court's ruling in that case should not be applied here. In essence, the Connecticut AG simply reiterates arguments made in its previous filings that the Commission dismissed in the September 19 order, without any additional legal support.

69. As stated, the Connecticut AG contends that the Commission decided not to hold a comparative hearing based solely on the Commission's belief that the project will foster competition and to allow the market to decide which project is best.[63] To the contrary, as discussed at length in the September 19 order, based on Commission and court precedent, the Commission determined that the two projects differed in many terms, including customer beneficiaries and intended benefits. Therefore, the projects were not

---

[60]Citing ANR Pipeline Co., 205 F.3d 403 at 406 (D.C. Cir. 2000).

[61]Id.

[62]ANR Pipeline Co. (ANR), 78 FERC ¶ 61,326 (1997), order issuing certificate and denying reh'g, 85 FERC ¶ 61,056 (1998), affirmed, ANR Pipeline Co. v. FERC, 205 F.3d 403 (D.C. Cir. 2000). In fact, Iroquois' arguments in its request for consolidation essentially mirrored those made by ANR in its proceeding.

[63]The Connecticut AG also argues that the Commission's decision not to consolidate the proceedings violates and ignores NEPA. Again, the Connecticut AG is confusing the Commission's mandate under the NGA and NEPA. The Commission's obligation under NEPA is discussed in the previous two sections. Therefore, we will not revisit that issue here.

mutually exclusive and did not require a comparative hearing under the Ashbacker doctrine.

70. The Connecticut AG argues that the two projects are mutually exclusive because Iroquois has stated that it will not construct its project if Islander East is built. As stated in the September 19 order, Ashbacker does not require that the Commission intervene in order to resolve a business competition that would ultimately decide that the better part of discretion is to withdraw from the field.[64] Additionally, in the September 19 order, the Commission throughly reviewed Iroquois' and Islander East's proposed customers and determined that they were not mutually exclusive.[65] Other than the statement that "there is unchallenged evidence in the record that Iroquois will not construct its pipeline,"[66] the Connecticut AG provides no argument contesting the Commission's analysis of potential shippers on the two projects.

71. The Connecticut AG claims that the Commission has effectively forced Iroquois out of the playing field by denying it any review. To the contrary, the Commission was in the process of reviewing its application and issued a preliminary determination on its ELI Project concurrent with its September 19 Islander East order.[67] Whether Iroquois determines it wants to continue to pursue its ELI Pipeline Project is a business decision that the Commission leaves to the pipeline to make. Further, we note that in ANR v. FERC, the court specifically addressed a situation in which the competing pipeline's applications were not on the same completion schedule and where the pipeline approved second may have to delay "building its pipeline extension only when sufficient demand justifies it, or when it can effectively wean existing customers away from" the other competing pipeline. It stated that:

> To be sure, this leaves ANR at something of a disadvantage, for the Nautilus pipeline is already in place and serving customers, because Nautilus filed its application first. So it might be thought that the short-term

---

[64]Islander East, 100 FERC at para. 42.

[65]Id. at para. 53 and 54.

[66]Id. at para. 14

[67]On October 4, 2002, Iroquois filed a motion requesting that the Commission defer consideration of its application in Docket No. CP02-52-000 to, among other things, allow time for market participants to consider and assess the "likelihood that the Islander East Project can promptly obtain the various other federal, state and local permits that are prerequisites for the construction of that project." Iroquois' motion to defer at 2.

> difficulty of competing with an incumbent pipeline makes the two pipelines in some sense exclusive. But FERC seems at least implicitly to have concluded that this kind of economic disadvantage is different from a situation in which economic factors make it possible to grant only one license, so that Ashbacker does not apply here. We think its judgment was reasonable.[68]

72. Accordingly, we find that the Connecticut AG has not provided any new evidence or arguments that would warrant a finding that the Islander East and Iroquois projects are mutually exclusive. The Connecticut AG's request for rehearing on this issue is denied.

b. Branford Land Trust's Arguments

73. In its comments, the Branford Land Trust states that the Commission's competitive analysis inexplicably ignores the existing Transco pipeline, which can currently deliver up to 489,000 Dth of natural gas per day from New Jersey to southwestern Nassau County. Therefore, it concludes that Long Island already enjoys the market competition and system redundancy that supported the reasons for preferring the Islander East Project.

74. The Branford Land Trust also contends that the Islander East project will threaten market diversity rather than enhance it. It states that the Commission's decision fails to recognize or account for the deleterious effect on competition allowing one of Islander East's largest customers of gas on Long Island, KeySpan, to obtain a controlling interest in Islander East that will provide Long Island with gas pipeline capacity that is greatly in excess of the market demand. It states that this vertical integration could allow KeySpan to engage in anticompetitive behavior by undercutting its competition. It argues that if the Commission were truly concerned about enhancing market forces it would be working to separate the financial interests of the pipeline companies and the downstream customers, not consolidate them.

Commission Response

75. As stated, the Branford Land Trust states that the Commission ignored the existing Transco pipeline that currently delivers gas from New Jersey to southwestern Nassau County. Transco's existing pipeline does not interconnect with KeySpan's facilities on eastern Long Island. Therefore, it is not a competitive alternative to Iroquois' existing mainline facility.

---

[68] ANR v. FERC, 205 F.3d at 406.

76. Branford Land Trust also argued that the Commission failed to recognize the "deleterious" effect on competition that allowing Islander East's largest customer, KeySpan, to have a controlling interest on Islander East would have. Branford Land Trust's argument is unsupported by any actual evidence. ANR raised a similar affiliate abuse argument in ANR v. FERC.[69] There the court found nothing inherently suspicious about the vertical integration of the affiliated companies.

6. Diversity of Supply

77. In the September 19 order, the Commission determined that the Islander East pipeline will, among other things, offer greater access to gas supply sources. On rehearing, the Connecticut AG contends that the Commission erred in determining that the Islander East Project will provide an additional diversity of supply. It states that in fact the gas in question comes from essentially one source, Sable Island. It contends that gas from Sable Island reaches southern New England through existing regional pipelines. It argues that both the Iroquois and Islander East projects are merely short, local tap-lines which change nothing in the regional picture except to shift a portion of natural gas supplies from Connecticut to Long Island. It states that both the Islander East and Iroquois pipelines will move gas from Connecticut to Long Island, therefore either line will have potential adverse consequences to Connecticut ratepayers by reducing a supply of natural gas in the State. The Connecticut AG cites to independent regulators that have described the supply situation in New England as "tight-as-drum" and noted that inducing "additional demand stress . . . competing for the existing delivery capacity of New England's pipelines has potentially ominous strategic implications for the security of New England's power supply."[70]

78. The Connecticut AG states that the Commission appears to recognize the burden and lack of benefit to Connecticut citizens when it states '[t]he fact that Algonquin's existing customers and Connecticut residents may not appear to benefit from the proposed projects does not mean that the proposed project's benefits do not outweigh any potential adverse impacts."[71] It argues that it is arbitrary and capricious to conclude that a project has a valid public benefit when it connects the markets of two states but

---

[69]205 F.3d 403.

[70]Citing Connecticut AG's January 18, 2002 rehearing request citing Steady-State Analysis of New England's Interstate Pipeline Delivery Capacity 2001-2005.

[71]Islander East, 100 FERC at para. 74.

brings no benefit to one and actually decreases supply and "ominously induces demand stress . . . for the existing delivery capacity for the entire New England region."[72]

Commission Response

79. Currently, natural gas and gas-fired electric generation facilities located in Suffolk County, New York and eastern Long Island are only served by Iroquois' existing pipeline. After Islander East is constructed, those eastern Long Island facilities will have two supply sources, Iroquois and Islander East. Accordingly, on a micro basis, once Islander East is constructed natural gas users in Suffolk County will have an additional source of natural gas supplies.

80. On a macro basis, as presently configured, Iroquois provides access to natural gas supplies from Canada. Once Islander East is constructed, gas facilities located in Suffolk County and eastern Long Island will have access to Canadian gas from Iroquois and the Sable Island area and other domestic supply sources accessible to Algonquin's mainline system from Islander East. If Iroquois constructs its ELI Pipeline Project, those facilities may indeed provide an additional access to Sable Island gas, if Iroquois constructs an interconnection with Algonquin's system. However, the potential for duplication in supply sources does not warrant a finding that a pipeline facility is not in the public convenience and necessity.

81. While the Connecticut AG has repeatedly argued that this supply is much needed by its citizens, there is no evidence in this proceeding that Connecticut customers have expressed any interest in expanding their current natural gas requirements by committing to firm contracts for new capacity. The Commission has determined that the proposed project will not impact Connecticut's existing service. Further, the proposed expansion of capacity on Algonquin's existing pipeline and Islander East's proposed project will increase existing capacity in Connecticut. As stated in the September 19 order, the Islander East and Algonquin projects will be able to increase the capacity that is available on those pipelines in Connecticut that could potentially serve Connecticut customers when and if potential shippers in Connecticut decide that they need to contract for more capacity. Also, interruptible service could be established at the currently proposed capacity level through the addition of taps in Connecticut.[73] The fact that Connecticut has chosen not to benefit at this time does not mean that the proposed project will not

---

[72]Connecticut AG rehearing request, at 15.

[73]Islander East, 100 FERC at para. 74.

benefit Connecticut in the future. The Connecticut AG's request for rehearing on this issue is denied.

7. Reliability

a. Connecticut AG Arguments

82. The Connecticut AG argues that the basic premise of the order is that Islander East is needed because two pipelines are better than one. It argues that if the Commission assumes more is better with regard to pipelines, and that the Commission's decision has nothing to do with the route by which any given pipeline crosses the sound. It claims that if a new pipeline is needed simply in order to have more pipelines, the new line could be placed in any area and should be placed in one with lesser environmental consequences.

83. The Connecticut AG claims that there was not a single piece of evidence that the existing Iroquois pipeline has ever failed. It argues that if reliability is such an important benefit, the EIS or the order should include an analysis demonstrating the alleged increase to reliability of the regional pipeline infrastructure that Islander East is suppose to provide. It argues that it is arbitrary and capricious for an administrative agency to approve a project with admittedly serious adverse environmental consequences, ostensibly on the basis of increased reliability. It argues that even if one were to accept without proof that more pipelines are good and increase system reliability, this conclusion would not in any way provide support for this particular project.

84. The Connecticut AG argues that there are numerous other projects, such as the Blue Atlantic Pipeline and others, that can provide apparently needed increased reliablity. It also contends that even Islander East could provide this increase in reliability without the pronounced environmental consequences of the proposed project, by simply moving its Connecticut landfall a few miles in either direction.

85. In response, Islander East asserts that the Commission specifically considered and rejected the Connecticut AG's arguments. It states that the Commission's finding of reliability was fully supported by the decisions of shippers who have specifically and deliberately chosen the Islander East Project over other available alternatives, particularly, Iroquois' ELI Project. It contends that KeySpan Delivery Companies[74] have

---

[74]KeySpan Delivery Companies include KeySpan Gas East Corporation, d/b/a KeySpan Energy Delivery Long Island and The Brooklyn Union Gas Company, d/b/a

(continued...)

explained that they chose to enter into precedent agreements with Islander East "to ensure that [they] would procure new firm capacity in a timely fashion in a manner that would enhance the reliability of [their] distribution systems and because the Iroquois ELI Project does not offer the same reliability benefits to KeySpan as Islander East."[75] It also cites to Brookhaven Energy Limited Partnership's (Brookhaven) comments on the draft EIS, which states that Islander East's proposal is in the public interest because of the increased reliability of both electric and gas service on Long Island that cannot be duplicated by the ELI System Alternative.

86. In response, Brookhaven states that the New York State Board on Electric Generation Siting and the Environment issued it a certificate of environmental compatibility and public need for the Brookhaven Energy facility. Brookhaven states that alternative projects that would involve the expansion of the existing pipeline serving eastern Long Island could jeopardize the viability of the Brookhaven project by subjecting it to the prospect that its output may be involuntarily curtailed by the Long Island Power Authority (LIPA) in periods of high load. It states that in the event of a disruption of the only current source of gas supply to the substantial amount of gas fired generation located in eastern Long Island, LIPA's ability to meet electric load on Long Island might otherwise be jeopardized.

87. Brookhaven asserts that any short term environmental benefits produced by expanding existing pipeline facilities on the Long Island Sound, rather than constructing a separate new pipeline as Islander East proposed, may be more that offset by the loss of the environmental and other benefits of the Brookhaven Energy Project. It urges the Commission to recognize that any temporary environmental benefits stemming from the expansion of existing pipeline facilities under the Long Island Sound must be weighed against the substantial and continuing adverse environmental and public interest impacts that would result if Brookhaven Energy were unable to proceed with its project.

Commission Response

88. A power plant currently being served solely by a single source of gas cannot serve its customers if something happens to disrupt that source of gas. As such, those customers will be without electricity until the pipeline is repaired and service is restored.

---

[74](...continued)
KeySpan Energy Delivery New York.

[75]Islander East answer, at 11, citing KeySpan Delivery Companies' April 23, 2002 answer.

Similarly, if an unexpected event that disrupts service to a natural gas local distribution company that relies solely on one source of gas to serve its gas customers, those customers will be without gas until the pipeline is repaired. If the event occurred during the winter, those customers could be without heat for an extended period of time. Therefore, when a second and alternative source is added to a particular area, there is an increase in the reliability of natural gas service to that area.

89. As pointed out in the September 19 order, disruption of existing firm service from Iroquois for any significant period could require KeySpan Delivery Companies to curtail service to up to approximately 124,000 natural gas customers on Eastern Long Island. This number does not include the disruptions to the many electric customers that presently rely on KeySpan electric generation facilities or the potential customers of Brookhaven's future gas-generation facility.

90. The Commission, as well as others, including the New York PSC and New York Reliability Council, believe it is important to plan for the single failure of any gas pipeline. Accordingly, the Commission is reasonably assured that it is in the public interest to approve a pipeline facility that will continue to provide service to high priority customers in the event service from other alternative pipelines experience long term disruptions. The fact that such a disruption has not occurred in the past does not mean that the Commission has to prove that it is likely to occur in the future to justify approving a second pipeline. The Connecticut AG's request for rehearing on this issue is denied.

b. Branford Land Trust Comments

91. In the September 19 order, the Commission addressed Branford Land Trust's argument that the Islander East pipeline is not needed to increase reliability of the pipeline infrastructure in eastern Long Island because Iroquois' existing system interconnects with the three pipeline companies in Connecticut that could serve Long Island.[76] It argued that damage to any of these three pipelines could be circumvented by routing the gas through the other two companies' lines.

92. In response, the Commission explained that it would be difficult to determine what, if any, impact a disruption on Iroquois' system upstream of its Connecticut facilities will have on supplies intended to be delivered to Long Island. Rerouting capacity from other pipelines would be dependent upon available capacity on

---

[76]Specifically, it refers to Iroquois, Algonquin, and Tennessee Gas Pipeline Co.

interconnecting pipelines and the feasibility of being able to get that capacity for use on Iroquois' system.

93. The Branford Land Trust states that the Commission inappropriately dismisses its argument that the interconnected nature of the pipeline system in southwestern Connecticut provides sufficient reliability. It argues that "replacing lost capacity on the hypothetically damaged Iroquois pipeline by delivery via the Islander [East] pipeline will also require rerouting the capacity on the same pipeline systems."

Commission Response

94. The Branford Land Trust's argument is based on the mistaken premise that if service on one pipeline is disrupted the gas from the damaged pipeline will need to be rerouted to the second pipeline to provide the necessary reliability. The availability of a second source of gas provides reliability because there will be two independent sources of gas. If something happens to one pipeline and it is unable to deliver its capacity to the LDC or power plant, the second pipeline can still deliver its volumes. If the second pipeline is operating at capacity, it will not be able to take on the additional capacity from the damaged pipeline but it will be able to continue to deliver its volumes. Accordingly, Long Island consumers will continue to receive natural gas supplies.

8. In-Service Date

95. The Connecticut AG objects to the assertion that the Islander East pipeline is required because it is the only project that will be ready in time for the 2003-04 heating season. It states that this fact is not a reasonable factor upon which the Commission could base its decision. It states that the commencement dates in the precedent agreements are vague and approximations of possible future needs. It contends that absent hard proof that a given commencement date is of material significance, it is arbitrary and capricious to define the project need based upon precedent agreements commencement dates, particularly when the company that owns Islander East is also one of the purchasers of the natural gas under the precedent agreements and thus is on both sides of the transactions. Additionally, it argues that because of the Connecticut moratorium Islander East will not be getting any permit decisions from state agencies until at the earliest June 2003. Therefore, the in-service dates advanced by Islander East will not be met. Therefore, the Connecticut AG argues that it is erroneous for the Commission to conclude in paragraph 61 that the meeting in-service dates of 2003-04 is a "chief consideration" underlying the Commission's decision.

Commission Response

96. In its request for a comparative hearing, Iroquois argued that there were similarities that overlap between its ELI Pipeline Project and Islander East's proposed facilities, particularly with respect to environmental matters, and that consolidation of common issues would foster administrative efficiency, avoid duplication of effort, and generally serve the public interest. In response, the Commission pointed out a comparative hearing is inherently a time consuming resolution process. It also stated that timely development of the necessary pipeline infrastructure and the parties stated need for the facilities for the 2003/2004 heating season were its chief considerations in determining that the Commission's approach not to grant a comparative hearing best serves those purposes, as well as administrative efficiency. As such, the in-service date was not the chief consideration in granting the certificate authorization. It was one of two chief considerations in determining that a comparative hearing would not foster administrative efficiency.

97. Whether Islander East will be able to construct its facility in time to meet its in-service date is not a determinative factor. Whenever possible, the Commission tries to process an application for a proposed pipeline within the time frame requested by the applicant. The processing of a certificate application is extensive and requires in-depth analysis of extensive data, studies, and other detailed information. Much of that information is provided by the pipeline and other parties while the Commission is processing the application. When the Commission has determined that there is sufficient information in the record to determine that the project is in the public convenience and necessity, the Commission will issue an order on the merits. Even after the Commission issues an order on the merits, however, as the case is here, the pipeline cannot commence construction until the pipeline receives final clearance from the Director of the Office of Energy Projects (OEP).

98. Oftentimes, a pipeline does not meet its proposed in-service date because the preconstruction requirements take longer than expected. However, that fact does not mean that the project is no longer required by the public convenience and necessity. As discussed in the previous orders and above, the Commission considers numerous factors to determine if a pipeline construction project should be approved. Those factors do not cease to exist if the pipeline fails to meet its proposed in-service date. The Commission believes it is essential that it act in a timely manner to allow Islander East the time necessary to comply with the required pre-construction conditions. As stated in the September 19 order, it is not in the public interest for the Commission to make that possibility a certainty by failing to move forward in this proceeding in a timely manner. The Connecticut AG's request for rehearing on this issue is denied.

9. Public Interest

99. As stated in the September 19 order, the Commission determined that it was in the public interest to issue the requested certificate authorization at that time. The Connecticut AG interpreted this statement to mean that the Commission believed that "it is in the public interest to ignore the moratorium enacted by the Connecticut legislature".[77] It asserts that the citizens of Connecticut, through their legislator, have the right and authority to determine what is in their interest and have done this by enacting a moratorium that does not ban or prohibit the project but seeks to accomplish what NEPA required the Commission to do, conduct a full need and environmental impact study before examining which, if any, projects can satisfy the legitimate needs of Long Island with the least environmental damage.

Commission Response

100. As stated in the September 19 order, in enacting the NGA, Congress placed ultimate authority for determining the location of interstate pipelines with the Commission, "a federal body that can make choices in the interest of energy consumers nationally."[78] As stated, the Commission has complied with NEPA and has completed the environmental impact study and determined that the Islander East Project is an appropriate project to satisfy the needs of Long Island consumers.

10. One Pipeline Alternative

101. The Connecticut AG also objects to the statement in the order that it contends indicates an objection to a one-pipe alternative because the relevant private companies have not evinced a willingness to work together. Without any cites to any legal authority or any legal argument, it states that if the Commission tells the companies that they can work together, they will find a way to do so.

Commission Response

102. In the September 19 order, the Commission discussed the possibility of a one pipeline alternative for the portion of the Iroquois' ELI and Islander East's projects that use the same route in the Central Pine Barrens on Long Island. The Commission did not state, nor does it support, a one pipeline alternative for the portion of the projects that cross Long Island Sound. Even assuming, for argument sake, that only one pipeline

---

[77]Connecticut AG's rehearing request, at 17.

[78]See National Fuel Gas Supply Corp. v. Public Service Comm. of NY, 894 F.2d 571 at 579 (2nd Cir. 1990)

would be built for the combined capacity of Iroquois' ELI and the Islander East Projects, that pipeline would have to be a facility similar to the proposed Islander East Project. An alternative similar to the ELI System Alternative that would use the existing Iroquois' facility cannot accomplished the policy goals satisfied by a second pipeline similar to the proposed Islander East Project.

11. Federal, State, and Local Permits

103. The September 19 order stated that any state or local permits issued with respect to the jurisdictional facilities authorized must be consistent with the conditions of the certificate. It explained that the Commission encourages cooperation between interstate pipelines and local authorities. However, the Commission pointed out that state and local agencies, through application of state or local laws, may not prohibit or unreasonably delay the construction or operation of facilities approved by the Commission.[79] Additionally, in the September 19 order, Environmental Condition No. 42 required that Islander East file documentation concerning its CZMA certificates of consistency from Connecticut and New York before it commenced construction of the facilities.

104. In response, the Connecticut AG states that the Commission does not have the authority to direct the results of state regulatory permit programs in contravention of state and federal law. It argues that to the extent the order is interpreted as requiring the Connecticut authority to approve permits under the CWA or under the CZMA, the order is invalid. It argues that these permits have the same force and validity under federal law and cannot be preempted by the Commission. Citing PUD No. 1 v. Washington Dept. Of Ecology (PUD),[80] the Connecticut AG states that:

> [t]he United States Supreme Court has already addressed this issue in a case involving the interplay between the CWA and the NGA and

---

[79] See, e.g., Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988); National Fuel Gas Supply v. Public Service Commission, 894 F.2d 571 (2d Cir. 1989); and Iroquois Gas Transmission System, L.P., et al., 52 FERC ¶ 61,091 (1990) and 59 FERC ¶ 61,094 (1992).

[80] 511 U.S. 700 (1994).

concluded: "[Section] 401 of the Act requires States to provide a water quality certification *before* a federal license or permit can be issued . . ."[81]

105. The Connecticut DEP Commissioner claims that the order violates the United States Constitution by usurping power that belongs to the States. It contends the Commission ignored the CZMA application procedure where Islander East needs to provide the Commission with certification that the project complies with the state's approved CZMA program. It states that Connecticut objects to Islander East's certificate and that the proposed activities are inconsistent with Connecticut's federally approved Coastal Zone Management Plan. On October 15, 2002, the Connecticut DEP issued its denial of Islander East's request for a CZMA consistency determination.

106. The Connecticut DEP Commissioner claims that this leaves the Commission in the awkward position of having issued the certificate prematurely and that it now must be revised to reflect the implications of the Connecticut DEP's objections to CZMA certification. Similarly, the Connecticut DEP Commissioner argues that the Commission can not issue a certificate for Islander East's project unless and until a water quality certification has been provided under the CWA. The Connecticut DEP Commissioner also cites to PUD, to support its contention that State certification is required before a federal license or permit can be issued. It argues that the CZMA and CWA are federal requirements and cannot be preempted by the Commission. Therefore, it concludes that the order is invalid.

107. The Central Pine Barrens Joint Planning and Policy Commission argues that the Commission's action is a gross violation of state law. It states that it represents an unacceptable amount of clearing. It contends that New York's Environmental Conservation Law prohibits development in the Core Preservation Area unless a hardship permit is issued. Therefore, it argues that the amount of clearing proposed by Islander East is illegal under State law.

Commission Response

108. Generally, the Connecticut parties raise two issues here. One concerns the Commission's authority concerning state permits issued under the CZMA and the CWA. The other concerns federal preemption over state and local permits.

---

[81] See Connecticut AG's rehearing request, at 18.

109. Concerning state and local permits, for over ten years, citing the Supreme Court's ruling in Schneidewind v. ANR Pipeline Co. (Schneidewind),[82] the Commission has included language in virtually every order in which a construction certificate is issued, including the September 19 order issued here, explaining its policy requiring applicants to cooperate with state and local agencies, but noting that such agencies may not, "through the application of state and local laws, . . . prohibit or unreasonably delay the construction of facilities approved by the Commission."

110. In Schneidewind, the Court ruled that Michigan's regulations aimed at regulating activities of a natural gas company was preempted by the NGA. In National Fuel Gas Supply Corporation v. Public Service Commission of the State of New York (National Fuel),[83] the court specifically addressed the issue of a state's ability to impose additional requirements on a pipeline construction project authorized by the Commission. Specifically, in National Fuel, the court reviewed the theories under which federal preemption of State law may be found, and held that a New York statute requiring an interstate pipeline to apply for and obtain a certificate of environmental compatibility from the New York PSC was preempted by the NGA on the grounds that either the NGA explicitly vested exclusive jurisdiction in the Commission to regulate interstate pipeline facilities or Congress had so occupied the field of regulation of interstate pipelines by enactment of the NGA that there was no room for the states to regulate.[84] Accordingly, the court held that the pipeline did not have to comply with New York's regulatory scheme.

111. Shortly after National Fuel was decided, the Commission, citing that case, found that a New York State Constitutional provision which would prohibit the taking of land for a pipeline route through State Reforestation Lands was preempted by the NGA,

---

[82]485 U.S. 293 (1988).

[83]894 F.2d 571(2nd Cir. 1990).

[84]The court noted that Congress established the Commission as "a federal body that can make choices in the interests of energy consumers nationally," and reasoned that because the Commission "has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review. Allowing all the sites and all the specifics to be regulated by agencies with only local constituencies would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need, with the increased costs or lack of gas to be borne by utility consumers in other states." National Fuel, 894 F.2d at 579.

which vests sole authority to determine an interstate pipeline route in the Commission.[85] Subsequently, the Commission explained its policy of encouraging applicants to cooperate with State and local authorities, stating:

> Although the Natural Gas Act and the regulations promulgated by the Commission pursuant to that statute generally preempt state and local law, the Commission has encouraged applicants to cooperate with state and local agencies with regard to the siting of pipeline facilities, environmental mitigation measures, and construction procedures. This is especially true with regard to the Commission's Stream and Wetland Construction and Mitigation Procedures which require pipelines to apply for state-issued stream crossing permits. However, the Commission's practice of encouraging cooperation between interstate pipelines and local authorities does not mean that those agencies may undermine through their regulatory requirements, the force and effect of a certificate issued by the Commission.[86]

112. With regard to a local authority's denial of a permit to a pipeline to conduct regulated activities within the town because the local agency thought another route was superior to the Commission-approved route, the Commission stated that the NGA "preempts state and local law to the extent the enforcement of such laws or regulations would conflict with the Commission's exercise of its jurisdiction under the federal statute."[87] The Commission further explained:

> [a] state or local agency may challenge a Commission decision by filing a timely request for rehearing and appealing a Commission decision to the courts. A state or local agency may not use its regulatory power to challenge a decision by this Commission.[88]

---

[85]Iroquois Gas Transmission System, L.P., 52 FERC ¶ 61,403-404.

[86]Iroquois Gas Transmission System, L.P., 59 FERC ¶ 61,094, at 61,346-47 (1992).

[87]Id. at p. 61,360. See also Maritimes & Northeast Pipeline, L.L.C. (Maritimes), 81 FERC ¶ 61,166, at 61,728-31 (1997)

[88]Id.

In sum, as held by the court in National Fuel, the NGA preempts state and local agencies from regulating the construction and operation of interstate pipeline facilities.[89]

113. That a state or local authority requires something more or different than the Commission, however, does not make it unreasonable for an applicant to comply with both the Commission's and another agency's requirements. It is true that additional state and local procedures or requirements could impose more costs on an applicant or cause some delays in constructing a pipeline. However, not all additional costs or delays are unreasonable in light of the Commission's goal to include state and local authorities to the extent possible in the planning and construction activities of pipeline applicants. A rule of reason must govern both the state's and local authorities' exercise of their power and an applicant's bona fide attempts to comply with state and local requirements.[90]

114. If a conflict arises, however, between the requirements of a state or local agency and the Commission's certificate conditions, the principles of preemption will apply and the federal authorization will preempt the state or local requirements. The Commission cannot act as a referee, on an ongoing basis, between applicants and state and local authorities regarding each and every procedure or condition imposed by such agencies. In the event compliance with a state or local condition conflicts with a Commission certificate, parties may bring the matter before a Federal court for resolution.[91]

115. While state and local permits are preempted under the NGA, state authorizations required under federal law are not. The Commission routinely issues certificates for natural gas pipeline projects subject to the federal permitting requirements of the CZMA and CWA.[92] This approach is founded on practical grounds. In spite of the best efforts of those involved, it is often impossible for an applicant to obtain all approvals necessary to construct and operate a project in advance of the Commission's issuance of its

---

[89]894 F.2d at 575-56 (setting forth circumstances under which the Supremacy Clause of the Constitution, Article VI, clause 2, provides for preemption of State and local law).

[90]Maritimes, 81 FERC at 61,730-31.

[91]Id.

[92]See, e.g., Gulfstream Natural Gas System, L.L.C., 94 FERC ¶ 61,185 (2001); Florida Gas Transmission System, 90 FERC ¶ 61,212 (2000).

certificate. This happens for many reasons. For instance, section 307 of the CZMA,[93] provides that "[a]t the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's consistency certification." This section further provides that "[i]f the state or its designated agency fails to furnish the requested notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed." In some cases, these deadlines are not met for whatever reason.

116. The regulations implementing the CZMA take this, and other, eventualities into account by providing that "[f]ederal agencies should not delay processing applications pending receipt of a State agency's concurrence."[94] That is exactly what the Commission has done here in processing Islander East's application and issuing a certificate, the exercise of the authority thereunder of which is conditioned upon, among other things, issuance of a determination of consistency with Connecticut's and New York's coastal management plan.

117. The validity of this approach was approved under a similar statute in City of Grapevine, Texas v. DOT.[95] In that case, the Federal Aviation Administration (FAA) approved a proposed runway before completion of the review process required by the National Historic Preservation Act (NHPA). To ensure compliance with the NHPA, the FAA conditioned its approval of the runway upon completion of the NHPA review. The court rejected a challenge to the validity of this approach, concluding that "because the FAA 's approval of the West Runway was expressly conditioned upon completion of the section 106 process, we find here no violation of the NHPA."[96] Here, Islander East's authorization to construct its proposed facilities is conditioned on its receiving its CZMA certification from New York and Connecticut.

118. As stated, the Connecticut AG and the Connecticut DEP Commissioner cite to the Supreme Courts ruling in PUD to support their argument that the Commission can not issue a certificate to Islander East until Connecticut issues a decision under the CZMA and a permit under the CWA. Their reliance on PUD is misplaced. In PUD, the

---

[93] 16 U.S.C. § 1456(c)(3)(A).

[94] 15 C.F.R. § 930.63(c) (2001).

[95] 17 F.3d 1502 (D.C. Cir. 1994).

[96] Id. at 1509.

Supreme Court addressed the issue of whether a state could condition a CWA permit on the maintenance of specific minimum stream flows to protect salmon and steelhead runs. In the background section of the opinion, the Court discusses requirements of CWA section 401. While it states that the CWA "requires States to provide a water quality certification before a federal license or permit can be issued," it goes on to explain that "[s]pecifically, [section] 401 requires an applicant for a federal license or permit to conduct any activity 'which may result in any discharge into the navigable waters' to obtain from the State a certification "that any such discharge will comply with . . . " the CWA.[97] Islander East is required to fulfill all Federal permitting and certification requirements before it can commence construction, including CZMA and CWA requirements. Accordingly, while the Commission has issued its certificate, Islander East cannot commence construction of the approved facilities until it complies with all required Federal permits. This is consistent with the court's ruling in PUD.

119. We note that on November 14, 2002, Islander East filed a notice of appeal of Connecticut DEP's decision with the Secretary of Commerce. Only time will tell whether the Secretary of Commerce will affirm or overturn Connecticut DEP's objections to Islander East's consistency determination or whether Islander East will be required to revise its project in order to obtain a consistency determination from the Connecticut DEP. Nevertheless, until Islander East obtains the necessary approvals under the CZMA and the CWA, it cannot exercise the authorization granted in the September 19 order to construct and operate its project. Meanwhile, Islander East can concurrently work towards complying with the other pre-construction conditions imposed in the September 19 order.

12. Constitutional Arguments

a. Eleventh Amendment

120. Generally citing Seminole Tribe of Fla. v. Florida (Seminole Tribe)[98] without any legal analysis, the Connecticut AG argues that "a state's sovereign immunity can be overridden only under a valid constitutional power."[99] It contends that the land underlying the Long Island Sound is owned by the respective states, New York and Connecticut, not the federal government. It states that from the high tide mark on the

---

[97]PUD, 511 U.S. at 707.

[98]517 U.S. 44 (1996).

[99]See Connecticut AG's request for rehearing, at 19.

Connecticut side of the Sound to the border with New York, the submerged lands under the Sound belong to, and are held in trust by, Connecticut for the sake of its citizens. It contends that no activity can occur on these public lands, without Connecticut's permission. Specifically, it states that Islander East will need a Structures and Dredging permit under Connecticut law and that no such permit has been issued. It argues to the extent the order states that all state permits must be consistent with the Commission's authorization and cannot prohibit or delay the project, it is illegal and unconstitutional.

121. In response, Islander East states that the Connecticut AG's argument that its consent is required before any activity can occur on the state trust lands is misguided. It states that the NGA occupies the field of natural gas regulation to the exclusion of state law, and therefore preempts state law that attempts to regulate within that field.[100] Islander East contends that federal courts have also held that state laws that could disable or render the eminent domain provisions of the NGA or Federal Power Act unenforceable are preempted.[101] Finally, it argues that a state may not use its own laws to frustrate the effectiveness of federal statutes.[102]

Commission Response

122. As discussed above, the Supreme Court's ruling in Schneidewind and the District Court ruling in National Fuel demonstrate that the NGA preempts state and local agencies from regulating the construction and operation of interstate pipeline facilities. In Seminole Tribe, Congress passed the Indian Gaming Regulatory Act (Gaming Act) under the Indian Commerce Clause. The Gaming Act allowed Indian tribes to conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located. Under the Gaming Act, states have a duty to negotiate in good faith with a tribe toward the formation of a compact, and the tribe may sue a state in federal court in order to compel performance of that duty. The

---

[100]Citing Schneidewind v. ANR Pipeline Co., 485 U.S. at 300 (1988).

[101]Citing Tennessee Gas Pipeline Co. v. Mass. Bay Transportation Authority, 2 F.Supp. 2d 106, 111 (D. Mass 1998); Pub. Util. Dist. No. 1 of Pend Oreille County v. FPC., 308 F.2d 318, 323 (D.C. Cir. 1962), cert. denied, 372 U.S. 908 (1963).

[102]Citing Stockton v. Baltimore & N.Y.R.Co., 32 F.9, 17-18 (CCNJ 1887)(finding that "[t]he constitution, and all laws made in pursuance thereof are the supreme law of the land; for, if the consent of a state is necessary, such state may always, in pursuit of its own interests refuse its consent, and thus thwart the plain objects and purposes of constitution").

Supreme Court held that the Gaming Act violated the state's sovereign immunity and that the Eleventh Amendment prevents Congress from authorizing suits by Indian tribes against the State to enforce legislation enacted under the Indian Commerce Act.

123. In Seminole Tribe, the Court states that:

> The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Subjects of any Foreign State."[103]

The NGA does not address "any suit in law or equity" against a state. Therefore, the application of the Eleventh Amendment and the Court's ruling in Seminole Tribe has no significance here. NGA preemption over state law and permits evolves from the Supremacy Clause. As the Court stated in Schneidewind:

> [t]he circumstances in which federal law pre-empts state regulation are familiar. . . . The NGA has long been recognized as a "comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce." The NGA confers upon the FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce. FERC exercises authority over the rates and facilities of natural gas companies used in this transportation and sale through a variety of powers.[104]

b. Tenth Amendment

124. The Connecticut AG and the Connecticut DEP Commissioner also argue that public trust land is owned by the people through their respective state governments and cannot be subject to seizure by a for-profit private company for its own purposes.[105] They claim that no federal court has held that a Commission certificate authorizes a utility company to override the Tenth Amendment to the Constitution and seize state land. Therefore, it argues that the order overreaches the power of the Commission,

---

[103]517 U.S. at 54.

[104]300-301 cites omitted.

[105]Similarly, the Branford Land Trust questions whether promoting market efficiency can provide sufficient justification for giving private, non-profit corporations the power to seize the property of private individuals and organizations.

intrudes on the sovereignty of the state, and violates the Tenth Amendment to the United States Constitution. The Connecticut DEP Commissioner makes a similar argument.

125. In response, Islander East contends that the power of eminent domain is vested in the federal government as an element of sovereignty, and may be exercised in the enjoyment of the powers conferred upon the federal government by the Constitution.[106] It states that there is no question that the United States may take property owned by a State. It asserts that the federal government, as well as federal agencies to whom the power of eminent domain has been delegated, can condemn property owned by a state over the State's objection.[107]

126. Islander East also points out that as explained by the United States Supreme Court:

> [i]f the right to acquire property. . . may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal Government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State. . . . This cannot be.[108]

127. Islander East states that the Tenth Amendment provides that, "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[109] Islander East asserts that by its terms, the Tenth Amendment is facially inapplicable, because the power at issue here is expressly granted to the federal government. It contends that there can be no doubt that the Constitution delegates to Congress power over interstate commerce.[110]

---

[106]Citing Kohl v. United States (Kohl), 91 U.S. 367, 372 (1876).

[107]Citing Id. at 373, United States v. South Dakota, 212 F.2d 14 (8th Cir. 1954)(approving the taking of state land for airforce base); United States v. New York, 160 F.2d 479 (2nd Cir. 1947)(permitting a temporary easement across state parkland for railroad purposes); Minnesota v. United States, 125 F.2d 636 (8th Cir. 1942)(allowing the taking of state land for Indian reservation).

[108]Islander East's answer at 18, quoting Kohl, 91 U.S at 371.

[109]Citing U.S. Const. amend. X.

[110]Citing U.S. Const. Art. I, § 8, cl. 3 (providing that "[t]he Congress shall have

(continued...)

128. Islander East also asserts that it is equally well-established that the transportation of natural gas from state to state is interstate commerce and in the public interest.[111] It states that Congress exercised its power over the transportation of natural gas by enacting the NGA and that pursuant to its express power to regulate interstate commerce, Congress may delegate the federal power of eminent domain to a private corporation,[112] such as in NGA section 7(h). Islander East asserts that the delegation necessarily extends to public or state property unless Congress expressly restricts that power.

129. Islander East further states that if a natural gas pipeline company cannot condemn property owned by a state, then the state can substantially raise the cost of a project, unreasonably delay a project or perhaps prevent it altogether. It contends that in this proceeding, Connecticut asserts its own parochial interests in an effort to frustrate the will of Congress and the public interest by depriving consumers of additional supplies of natural gas. It states that through the NGA, Congress allowed for delegation to natural gas companies the power of eminent domain in order that the company could "comply with [Commission's] requirements as well as with all phases of the statutory scheme of regulation."[113]

130. Islander East states that a natural gas pipeline company that holds a FERC Certificate and commences an action under NGA section 7(h) to condemn property owned by a state is acting on behalf of the federal government to implement a decision that the pipeline project serves the national interest. Thus, "lands are subject to be taken by eminent domain" by a natural gas pipeline company acting pursuant to a Commission

---

[110](...continued)
Power to . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

[111]Citing Thatcher v. Tennessee Gas Transmission Co.(Thatcher), 180 F.2d 644, 646 (5th Cir. 1950)(stating that "[t]here can be no quarrel with the statement that the transportation or movement of natural gas . . . is interstate commerce"), cert. denied, 340 U.S. 829 (1950).

[112]Citing Southern Pacific Transportation Co. v. Watt, 700 F.2d 550, 554 (9th Cir), cert. denied, 464 U.S. 960 (1983).

[113]Citing Thatcher, 180 F.2d at 647.

certificate.[114] Islander East also states that the Connecticut AG suggests that the State of Connecticut's sovereign immunity would be violated by the condemnation of the public trust lands. Islander East contends that case law makes clear that sovereign immunity is not a bar to the exercise of the federal power of eminent domain with respect to lands held in trust by a state.

Commission Response

131. In NGA section 7(c), the Congress gave the Commission jurisdiction to determine if the construction and operation of proposed pipeline facilities are in the public convenience and necessity. Once the Commission makes that determination, in NGA section 7(h), Congress gave the natural gas company authorization to acquire the necessary land or property to construct the approved facilities by the exercise of the right of eminent domain if it cannot acquire the easement by an agreement with the landowner. The Commission itself does not grant the pipeline the right to take the property by eminent domain. We find Islander East's response to the Connecticut AG's argument persuasive.

B. Central Pine Barrens

132. In the September 19 order, the Commission discussed Islander East's proposed Calverton Lateral Route and Calverton State Route 25 Alternative recommended in the final EIS. The Commission pointed out that the Calverton Lateral Route would go through a developing subdivision. Based on the information available at the time of the September 19 order, there were eleven residences within 50 feet of the Calverton Lateral Route. The developer of the Meadowcrest subdivision stated that 15 homes were completed and an additional 36 would be constructed by the close of 2002. Additionally, there were eight planned residences that would be impacted by the proposed Calverton Lateral Route in the Spring Meadow subdivision.

133. In light of the development, the Commission determined that the Calverton State Route 25 Alternative was the preferred route. The alternative would minimize the length of the lateral, maximize the use of existing rights-of-way, and minimize impacts to new

---

[114] Citing Tennessee Gas Transmission Co. v. Arkansas, 232 Ark. 156, 335 S.W.2d 312 (Ark. 1960)(finding a natural gas company liable for nominal damages to State on account of its pipeline crossing a navigable river).

residential areas.[115] The Commission explained that it prefers pipeline routing along existing road or utility rights-of-way, whenever possible, over creating a new greenfield pipeline right-of-way, especially through residential areas.

134. In response to concerns that the alternative would impact wetlands and endangered and special concern species, the Commission stated that the Calverton State Route 25 Alternative does not cross any identified National Wetland Inventory mapped wetlands, and the area of species habitat along the alternative would be avoided by the use of an HDD crossing of Horn Pond and the surrounding area. The Commission explained that by routing the lateral along State Route 25, the permanent right-of-way would abut the road right-of-way and avoid further fragmentation of the Core Preservation Area (CPA). Further, the alternative would avoid the unfragmented areas identified by the Pine Barrens Society as being located north and south of State Route 25, since activities would be limited to a 60-foot-wide corridor adjacent to the road.

135. Numerous individuals filed letters requesting that the Commission reconsider its decision to route the pipeline along the Calverton State Route 25 Alternative expressing concerns about the amount of clearing of trees that will be required. Numerous letters echo previous concerns regarding the alternative's impact on wetlands and endangered species. Ginny Fields, a Suffolk County Legislator, states that the Pine Barrens is located above the sole aquifer and source of drinking water for portions of Suffolk County. She states that it is imperative not to impact a sole source of drinking water to avoid impacting the construction of twelve homes.

136. As discussed in the September 19 order, the Calverton State Route 25 Alternative is the Commission's preferred route because it will limit the impact on numerous existing and proposed residences. Further, the route will run parallel to an existing road and will not fragment the CPA. It will not impact any wetlands or endangered species. Additionally, the final EIS discusses the Suffolk County aquifer and determines that the adherence to the procedures discussed in the final EIS would provide adequate protection for the aquifer. We also note that Environmental Condition No. 13 requires that Islander East, among other things, notify the Suffolk County Department of Health Services of activities that will occur in the aquifer protection area.

137. The Central Pine Barrens Joint Planning and Policy Commission states that the Commission's action is a gross violation of state law. It states that it represents an unacceptable amount of clearing. It contends that New York's Environmental Conservation Law prohibits development in the core area unless a hardship permit is

---

[115]Final EIS at 4-26 - 4-29.

issued. Therefore, it argues that the amount of clearing proposed by Islander East is illegal under State law. Finally, it requests that the Commission require that Islander East purchase land to be placed in government ownership to replace the cleared land.

138. The Sustainable Energy Alliance of Long Island contend that the objection of one developer cannot be allowed to undermine what is ultimately in the public interest. It asserts that the Commission should ensure that all measures will be taken to comply with the strict guidelines imposed in the Pine Barrens Act.

139. As discussed above, if a conflict arises between the requirements of a state or local agency and the Commission's certificate conditions, the principles of preemption will apply and the federal authorization will preempt the state or local requirements. In the event compliance with a state or local condition conflicts with a Commission certificate, parties may bring the matter before a Federal court for resolution.[116] While state law is preempted by the NGA, Environmental Condition No. 39 requires that Islander East consult with the Central Pine Barrens Commission concerning the construction through this area. Finally, any issues concerning compensations should be discussed and addressed at easement negotiations or during the eminent domain proceedings.

140. The New York State Office of Parks, Recreation and Historic Preservation filed a letter expressing concern about the impact the proposed route would have on Brookhaven State Park along the William Floyd Parkway. It states that if the right-of-way is reduced to 60 feet wide and will be completely within parkway right-of-way, then construction in that area would be acceptable. It also states that the Calverton Lateral alternative would be acceptable if it is contained in the State Route 25 right-of-way and if intrusion into park land is avoided to the greatest extent possible. With the above mentioned terms, construction in the area would be acceptable to the New York State Office of Parks, Recreation and Historic Preservation. As modified in the final EIS, and adopted in the September 19 order, the current route is in accord with these requirements.

C. Other Environmental Issues

141. Several parties and individuals raised comments concerning the final EIS. On September 30, 2002, the EPA filed a letter summarizing its review of the final EIS. The letter generally requests further information and comments on numerous aspects of the final EIS. On December 11, 2002, Islander East filed supplemental information, among other things, to update its consultations with various state and federal agencies. The

---

[116]See Maritimes, 81 FERC at 61,730-31.

December 11 filing also provides additional information and addresses concerns raised by the EPA in its September 30 letter.[117]

1. Final EIS Executive Summary

142. CT Stop the Pipeline (CT STP) questions various statements in the final EIS Executive Summary that it contends are inaccurate. For example, it states that the Executive Summary states that Connecticut will benefit. It disagrees and wants the statement removed from the EIS. It also argues that the acreage of potential offshore impact listed in the Executive Summary is inaccurate due to additional impacts from sedimentation, drilling mud releases, and anchor scars and should be revised to reflect those impacts.

143. As addressed in the September 19 order and above, the fact that Connecticut currently does not have contracts for service off the proposed pipeline does not mean that Connecticut will not benefit in the future when and if consumers in that state need to contract for service from the pipeline. The offshore acreage affected by the construction is an estimation based on modeling and using available data, and as such, is not an exact calculation. Further, we note that once the final EIS is issued the Commission does not modify the document. We do not believe the concerns raised by CT STP warrant any changes to the final EIS.

2. Modeling/Offshore Impacts

144. The September 19 order discussed the computer model Islander East conducted of potential spoil mound erosion. The Commission stated it agreed with the conclusion in the final EIS that the modeling effort adequately addressed the impact to the sediment mounds from a likely, foreseeable storm event and took that into consideration when it determined that Islander East's proposed project would be an environmentally acceptable action. However, the Commission determined that if a non-typical storm event were to occur during construction, there may be some unanticipated damage. As such, it required that Islander East run the offshore sedimentation model on the shallower sections of the spoil mounds. The purpose of the additional modeling was to provide the basis for subsequently determining damages in the unlikely event of a non-typical storm.

145. Several parties question the validity and extent of the offshore modeling. The Connecticut AG specifically refers to the Commission's requirement that Islander East conduct further modeling to adequately determine near shore areas that should be

---

[117] See Islander East's December 11 filing, Section 1 at tab 10.

monitored for potential sedimentation impacts. It contends that the EIS cannot be considered complete when the model has not been run and the information reviewed. The Branford Land Trust also contends that there is a significantly high probability that the dredged sediments will be exposed to larger erosive and dispersive forces than were used by Islander East to analyze the dispersion of sediments on nearby productive shellfish habitat.

146. As stated, the Commission determined that the modeling reviewed in the final EIS was sufficient to analyze the reasonably foreseeable impact of the project as required by NEPA. The additional modeling was required solely to create a basis for determining subsequent damages that the pipeline may be responsible for in the event there is more damage than anticipated. As stated in the September 19 order, any damages caused by the construction of the project are the responsibility of the pipeline company, regardless of whether the impacts were anticipated through modeling or occurred due to unexpected conditions.

147. The EPA raises numerous issues and requests further information concerning Islander East's modelings to predict offshore impacts that it claims were not included in the final EIS. The final EIS does not restate or include all of the data in the public file, but rather is a tool to summarize and analyze potential impacts associated with the proposed project. Several documents in the record provide the details requested by EPA for such offshore issues as computer modeling data for sediment dispersion, soil physical properties and the relationship to trench size, trench spoil transport and placement, modeling inputs related to storm events, sediment fate and transport along the plowed trench, and turbidity and resuspended sediments.[118] Further, Islander East provides additional information in response to the EPA's letter in its December 11 filing. We find that these documents sufficiently address the EPA's concerns.

3. Limited Adverse Impacts

148. CT STP points out that the final EIS states that anchor depressions could persist for years and that seabed depressions are long-term impacts. It argues that the final EIS failed to consider these significant long-term impacts when it determined that the Islander East project would have "limited adverse" environmental impact.

---

[118]The documents include: a report entitled, "On the Erosion and Transport of Sediments Displaced by the Construction of the Islander East Natural Gas Pipeline Across Long Island Sound: A Continuing Investigation," filed with Commission on July 18, 2002; a report entitled "Dredged Material Mound Dispersion Analysis Using LTFATE," filed with Commission on July 29, 2002.

149. CT STP also argues that it is important that the Commission specify that the temporary construction right of way and extra work areas in forested areas will take at least 100 years to return to pre-construction conditions, especially if mature trees will not be replanted in these vicinities. It states that deforestation and degradation to area wetlands should be classified as long term, not limited or able to be mitigated.

150. Similarly, the EPA states that it cannot agree with the conclusion that the construction and operation of the pipeline would result in limited adverse environmental impacts. It cites to impacts to 3100 acres of open water, 125.5 acres of forested habitat, including forested wetlands, and 83.1 acres of open land.

151. In response, Islander East states that it engineered its pipeline to minimize impacts on environmentally sensitive resources such as wetlands and waterbodies, and has revised its construction plans to use techniques that will reduce disturbance to marine life and threatened and endangered species. It states that it also intends to use the mitigation measures described in its Erosion Sedimentation and Control Plan, such as adhering to fisheries' timing windows for waterbodies construction, minimizing construction rights-of-way widths in wetlands, installing temporary sediment barriers and permanent erosion control, minimizing duration of construction in wetlands and waterbodies, restoring the right-of-way to preconstruction contours, and revegetation of the right-of-way. It contends that these are proven pipeline construction methods that have been used in both onshore and offshore activities.

152. The final EIS specifically states that "[t]he establishment of new and expanded rights-of-way would result in long-term, unavoidable impacts." It also states that "loss of forests in the construction right-of-way would require 25 to 150+ years for full recovery from preconstruction levels" and that "offshore impacts to live bottom would generally be long term."[119] The final EIS acknowledges these long-term impacts and took them into consideration when it determined that the overall project will have limited adverse environmental impacts.

4. Restoration of Oyster Beds

153. The Connecticut AG also contends that the Commission failed to demonstrate that damaged oyster habitat can be replaced. It states that without a nearshore sedimentation impact analysis, there is no data to determine what damage this project will cause and without a mitigation plan there is no means to review the proposed methods of dealing

---

[119]Final EIS at 5-1.

with the very damage it cannot yet evaluate. Similarly, in its October 15, 2002 CZMA determination letter, the Connecticut DEP concludes that the project would "irrevocably alter and permanently destroy" shellfish habitat, that "on-site mitigation to restore oyster beds is not possible," and that reseeding efforts would fail due to a lack of a firm, hard substrate for oyster spat to set and grow.

154. Information provided on the National Oceanic and Atmospheric Administration's (NOAA) Coastal Services Center website indicates that oyster attachment sites include almost any hard surface such as other living oysters, oyster shell, rocks, docks, pilings, and glass bottles, and that oyster larvae may preferably select oyster shell as a substrate. The website goes on to state that commercial oyster harvesters often "seed" areas with oyster shell (called "culch") to promote spat settlement.[120] This information indicates that appropriate site preparation of disturbed areas (e.g., replacement with oyster shell or other hard surface) could serve to mitigate impacts of oyster beds, averting the "permanent destruction" of shellfish habitat claimed by the Connecticut AG and DEP. Therefore, the Commission is reasonably assured that, if necessary, Islander East can replace the damaged oyster habitat.

5. Wetland Issues

155. Numerous parties and individuals raised issues concerning the project's impact on wetlands. In its comments, the EPA contends that the final EIS lacks detailed information necessary to understand the direct, indirect, and secondary impacts to wetlands and waters associated with the proposed project. It states that the analysis lacks detailed information on the specific locations, functions, and values of the wetlands and aquatic ecosystems impacted by the project. It asserts that the lack of detailed information on the quality of the wetlands and other aquatic ecosystems impacts makes it difficult to determine the relative impacts of various alternatives. The FWS requests that Islander East perform field delineations for wetlands that would be impacted by potential route variations prior to selecting a final route.

156. In response, Islander East states that where survey access was available, it completed wetland delineation in accordance with the COE's Wetlands Delineation Manual, and, in Connecticut, according to the Connecticut state delineation criteria. It asserts that NEPA regulations do not require that all of the detailed studies be included in

---

[120] http://csc.noaa.gov/acebasin/specgal/oyster.htm See also NOAA's Hudson Raritan Estuary Oyster Bed Restoration Project web page at http://www.nmfs.noaa.gov/habitat/restoration/community/projects/hudsonraritanestuaryoyster.htm

the EIS, but they are typically analyzed and studied. Islander East also points out that while the pipeline construction will temporarily disturb wetlands, no wetlands will be permanently filled and the project will not result in a net loss of wetlands.

157. As stated in the final EIS, wetlands affected by the project, as surveyed, were delineated using the U.S. Army Corp. of Engineers Wetlands Delineation Manual. Table 3.7.1-1 in the final EIS lists all the wetlands crossings affected by the construction and section 3.7 of the final EIS discusses the environmental consequences of the proposed project, construction and mitigation procedures, and site-specific wetland impacts. The analysis for alternatives takes into account various land use issues in addition to wetlands crossed. Surveys for all wetlands may not be completed, for route variations as well as for portions of the proposed pipeline, until landowner approval has been received by the pipeline company or until the pipeline can exercise its use of eminent domain to gain access to perform the required wetland surveys. In addition to the review of National Wetlands Inventory maps that has already been performed, Environmental Condition No. 5 requires that Islander East perform field delineations for route realignments for the entire certificated route, including recommended route variations.

6. Use of Existing Row

158. CT STP contends that collocation of pipeline adjacent to the Branford Steam Railroad constitutes a new utility corridor and goes against the statement that it reduces the need to establish new utility corridors. It argues that the right-of-way must go through wetlands, forest, and land trust property. It also claims that the expansions of existing right-of-way reduces the overall percentage of existing open space and cannot be mitigated. Therefore, it argues that because of these long term adverse impacts, the percentage of pipeline that runs adjacent to the railroad be subtracted from the overall figure of 83 percent. Whether the land use is open, forested, or wetlands does not change the fact that the pipeline would be adjacent to an existing railroad (i.e., utility) corridor. Therefore, we do not agree that this area should be subtracted from the overall existing right-of-way calculation.

7. Right-of-way Width

159. The EPA recommends that the width of the rights-of-way along the route be reduced to the greatest extent possible to reduce adverse environmental impacts. In its December 11 filing, Islander East provides additional explanation of the standards it used to determine the widths of construction to reduce rights-of-way.

160. As stated in the final EIS, Islander East has minimized impacts by reducing the width of the permanent right-of-way in wetlands and collocating the proposed right-of-way with existing rights-of-way. Right-of-way widths need to be of sufficient size to install the 24-inch diameter pipeline and operate equipment safely. This width needs to accommodate spoil storage, the trench, pipe stringing, and equipment travel lanes. Some of these areas, such as the trench, have OSHA worker safety concerns. Also, topography must be considered, since pipeline rights-of-way constructed along the side of hills need greater widths to establish safe workspaces. A 75-foot-wide construction right-of-way for this large diameter pipe is usually the minimal width that is used in a relatively level terrain. We find that Islander East's right-of-way widths comply with Commission requirements.

8. Additional Projects

161. CT STP states that Islander East must be forthcoming about specifics of additional projects that would be needed for it to meet its contractual obligations. It asserts that Islander East should specify these projects and that the EIS reflect the additional environmental impacts. It states that without this information the final EIS is incomplete because full environmental impacts of the pipeline are not included.

162. Islander East's contracts with its existing shippers contemplate maximum daily transportation quantities may increase from 260,000 Dth per day in the first year of service to 445,000 Dth per day in 2008. It states that it recognizes that if the proposed facilities need to be expanded to meet its shippers' requirements. It states that it will file additional applications when necessary to install compression and/or pipeline looping when final capacity commitments are made. However, because specific future demand is unpredictable at this time any specific facilities for anticipated expansion are speculative.

9. Railroad Right-of-way

163. CT STP states that the final EIS does not address the need for the development of a site specific plan to identify areas of potential contamination. It states that the likelihood of soil contamination is highly probable. The Branford Land Trust states that excavation along the railroad right-of-way in or immediately adjacent to wetlands will disturb contaminated soils and degrade the water quality of the nearby wetlands. The Commission addressed this issue in the September 19 order.[121] CT STP has not raised any new issues that would warrant the Commission revisiting this issue.

---

[121]Islander East, 100 FERC at para.133.

10. Bedrock Testing/Groundwater Contamination

164. CT STP is concerned about the accuracy of the bedrock from MP5.4 to 5.6. It states that Islander East should be required to hire a consultant from the Town of North Branford, the Connecticut DEP or the Regional Water Authority. The Connecticut AG also raises the need for a site-specific study to support its argument that the final EIS was incomplete. The Branford Land Trust also argues that construction between MP5.4 and 5.6 will exacerbate the contamination of groundwater resources.

165. North Branford reiterates its previous comments that the contaminated groundwater issue should have been studied before issuance of a permit and that the necessary environmental and scientific studies should be conducted by an impartial, third-party, rather than a sub-contractor of the applicant.

166. North Branford argues that evaluation on the localized, groundwater contamination in the direct path of the pipeline should have been a piece of fundamental scientific data, germane to the Commission's decision-making process. It states that the bedrock in the subject area is fractured and complex and that the Rizzo Association advised against further disturbance or testing to prevent a spread in the pollution plume. It argues that it is impractical to remediate the tetracholoroethylene (PCE) in the area of the pipeline. It states that proper environmental assessment of the existing PCE plume would have given the Commission and Islander East the required information to evaluate the route of the pipeline. Therefore, it concludes that no tool exists for the parties to reach a valid conclusion that the present route was possible in light of the potential for subsurface spread of the existing PCE plume and the high potential contamination of potable water sources and Cedar Pond.

167. Environmental Condition No. 14 requires Islander East to conduct a site-specific study of this area before commencing construction. We note that the studies could not be performed prior to the certificate, because access to the land was restricted by the landowner. In addition, the condition specifically requires that the parameters and planning of the site-specific study will be determined with input from the Connecticut DEP and reviewed by the Commission environmental staff. This allows for a review of the site-specific plan prior to its implementation, regardless of who will be performing the study.

168. The Department of the Interior expressed concern about the potential movement of contaminated groundwater along the pipeline trench in the vicinity of Brookhaven National Laboratory (BNL), or resuspension of contaminants during construction restoration of the Peconic River crossing. The Department of the Interior recommended

that Islander East consult with the BNL to determine where hot spots may occur along the proposed route. The Department of Interior also recommended that Islander East: (1) develop a contingency plan in the event the contaminated groundwater is encountered during construction; (2) ensure that changes in groundwater movement along the trench do not occur; and (3) develop and implement a post-construction monitoring and remediation program in coordination with BNL staff to ensure that any changes in contamination movements are detected and remediated.

169. The final EIS states that Islander East has already consulted with the BNL concerning contamination on the property and has determined that contaminated soil and groundwater are unlikely to be encountered during construction.[122] It states that general construction procedures, such as trench plugs, are required to ensure that changes in groundwater movement along the trench do not occur.[123] BNL staff can request a post-construction monitoring plan during easement negotiations if it is determined that this is necessary. Otherwise, Islander East would implement its Unexpected Contamination Encounter Plan. We believe that Islander East's previous consultations with the BNL and the construction procedures identified in Islander East's Erosion and Sedimentation Control Plan serve to adequately address the Department of Interior's concerns over contamination movement on BNL property.

11. Archeological Testing

170. North Branford objects to continued lack of sufficient information to adequately assess critical environmental and archeological factors in North Branford. It states that the limited testing that served as a basis for the tests extrapolated inaccurately that there are no items of cultural and historical significance. The Town of North Branford also questioned the accuracy of the archeological information gathered by Islander East. The Commission addresses this argument in the September 19 order.[124] The parties have not raised any new arguments that would warrant that we revisit this issue. However, we note that all archeological surveys will be reviewed by the State Historic Preservation Officer (SHPO) as well as FERC staff prior to construction, as required in Environmental Condition No. 42.

12. Construction Timing/HDD Drilling

---

[122]Final EIS at 3-141.

[123]Final EIS at section 3.3.1.2.

[124]Islander East, 100 FERC at para.130.

171. CT STP requests that Islander East not be allowed to construct the onshore portion of the pipeline until the HDD of the Connecticut shoreline has successfully been completed. As indicated in the final EIS, Islander East's original construction schedule called for the construction of the offshore section in the winter of 2002 - 2003, in order to meet the timing restrictions for the protection of aquatic life. The onshore work would follow in May 2003. In acknowledgment of the sensitivity of the Sound crossing and specifically the Connecticut shoreline, the order included environmental condition 21 which requires Islander East to complete successfully the pilot hole for the HDD before beginning any offshore work. The condition further requires Islander East to develop and file an alternative crossing plan in the event of an unsuccessful HDD.

172. On October 15, 2002, the Connecticut DEP denied Islander East's application for a CZMA consistency determination. Islander East subsequently withdrew its application to the COE for its Rivers and Harbors Act section 10 and Clean Water Act section 404 permit applications.[125] On October 23, 2002, Islander East filed updated information with the Commission indicating that in light of recent events, it proposed to complete the onshore portion first, followed by the offshore section in the winter of 2003 - 2004.

173. The Commission continues to maintain that the successful completion of the HDD, or a suitable alternative, is essential to mitigate the near shore impacts. However, actual timing of that construction is uncertain. Therefore, we believe it is premature to modify Environmental Condition 21 to require that the HDD be completed before any onshore construction begins. The onshore construction does not have unresolved issues of the same magnitude, and is governed by numerous other conditions in the order. Accordingly, we will revisit this issue at such time as the project is nearer to actual construction and Islander East requests authorization to begin construction. We note that the start of both onshore and offshore construction cannot occur until Islander East complies with the conditions of the order. This includes receiving appropriate permits and filing an Implementation Plan for review and written approval of the Director of OEP.

174. The EPA requested that more information should be required to describe what constitutes drill failure, including how many drill attempts would be made before determining failure. In its December 11 filing, Islander East provided a description of its HDD technique. It also described possible failure scenarios and estimates of the

---

[125]After the Connecticut DEP issued its notice of intent to deny Islander East's CZMA certification, Islander East requested a deferral of its COE permit application. The COE responded to Islander East's request by withdrawing its application without prejudice. See Islander East's December 11 filing at section 1, 1-1.

probability of those failures. We note that information concerning Islander East's HDD contingency plan is required under Environmental Condition No. 21, in the event that a failure occurs. In response to the comment concerning the recapture of offshore drilling mud, we note that a plan for the containment of drilling muds released to Long Island Sound is discussed in Appendix N of the final EIS. Further, Environmental Condition No. 22 requires that Islander East file the monitoring program plan in Appendix N with the Connecticut DEP and the New York State Department of Environmental Conservation for further consultation.

13. Environmental Inspectors

175. CT STP requests that Islander East fund a program whereby an affected municipality can hire its own consultant to monitor construction for environmental compliance. There are several avenues for a landowner or municipality to provide input on environmental compliance during construction, without requiring an independent consultant. Environmental Condition No. 7 requires that the Environmental Inspectors are responsible for documenting compliance with environmental conditions of the order, as well as any environmental conditions/permit requirements imposed by other Federal, state or local agencies. The reports are filed with the Commission and are available on its web page. While the pipeline company generally only sends a copy of the cover letter to all parties on the service lists, individuals can request copies of the report directly from the pipeline company.

176. Similarly, Environmental Condition No. 8 states that on request, status reports will be provided to other Federal or state agencies with permitting responsibilities. These status reports are to include a description of any landowner complaints that may relate to environmental compliance. In addition, Environmental Condition No. 32 requires that Islander East develop and implement a complaint resolution procedure to ensure that landowners are provided with clear and simple directions for identifying and resolving their environmental concerns. We believe these requirements are sufficient to allow individuals to be kept informed concerning the pipeline's compliance with the environmental conditions. However, individuals are free to negotiate the terms and conditions into their easement agreements with Islander East.

14. Including Power Plants in EIS

177. FWS states that the final EIS does not address impacts resulting from the construction and operation of any new generation facilities that may be associated with the project. It contends that 40 CFR 1508.7 requires "past, present, and future reasonably forseeable actions" be included. FWS claims that because one of the primary

purposes of the pipeline is to supply these facilities, it believes the Commission should have identified and quantitatively described impacts associated with these facilities as part of cumulative impacts.

178. The final EIS states that the Commission applies the four-factor procedure developed by the COE to determine if there is sufficient Federal control or responsibility over the project as a whole to warrant environmental analysis of related nonjurisdictional facilities.[126] Under the four factor test, the final EIS concluded that Federal control and responsibility is not sufficient to warrant an extension of the Commission's environmental review to include the nonjurisdictional facilities. However, the final EIS did address construction of customer facilities and reasonably foreseeable projects related to the proposed Islander East Project in the cumulative impact analysis in section 3.13 of the final EIS.

15. Endangered Species

179. FWS states that if measures incorporated in 3.6.4.1 are followed, the project is not likely to adversely affect the piping plover in New York. If they are not incorporated, it states that a biological assessment or further consultation will be required. Islander East is required to incorporate the requirements of 3.6.4.1 into the construction of the pipeline. Therefore, there would be no impact on the piping plover.

16. Compensatory Mitigation

180. FWS requests compensatory mitigation for impacts to waters of the U.S. that can not be avoided or reduced. It requests an opportunity to review and comment on any mitigation plans. As discussed in the final EIS, the COE may develop wetland compensation as part of its section 404 permitting process. FWS should deal directly with the COE on that issue.

17. Other EPA Issues

181. The EPA also questioned how Commission approval can come before the end of the typical 30-day waiting period. In accordance with the Council on Environmental Quality's (CEQ) regulations implementing NEPA, no agency decision on a proposed action may be made until 30 days after the EPA publishes a notice of availability of a final EIS. However, where agencies have a formally established appeal process, such as

---

[126]Final EIS at 1.4.

the Commission's rehearing process, the agency may approve a project, subject to rehearing, at the same time as the final EIS is published.

182. Several issues raised by the EPA in its comments on the final EIS were addressed in greater detail in the final EIS, however, not in the sections referred to in the EPA's comment letter. For example, the EPA requested more details on extra workspaces mentioned in section 2 of the final EIS. Workspaces are discussed in detail in the final EIS in Appendix F and table 3.8.1-3, and are shown in the filed photo alignment sheets. Discussions of turbidity impacts which the EPA references on page 3-51 of the final EIS appear in greater detail in section 3.4.1 of the final EIS in reference to potential impacts on fisheries and shellfish. Similarly, the one line reference to open water that the EPA refers to on page 3-103 of the final EIS does not constitute the analysis of waterbodies. Section 3.3.2 of the final EIS discusses surface water and concentrates on waterbody crossings of less than 100 feet. Islander East also provides additional information on these issues in its December 11 filing.

183. The EPA also states that it needs more information concerning Islander East's conclusion that no blasting will be required in Long Island Sound. In response, Islander East states that it conducted geophysical surveys along the offshore portions of its route. It contends that based on the results of the side-scan sonar surveys, sub-bottom profiling, and geotechnical borings completed in offshore waters, Islander East concluded that no bedrock is present within the uppermost eight feet of seabottom sediments to prevent installation of the pipeline. It states that blasting will not be required to install its pipeline across Long Island Sound. We find Islander East's conclusion that it will not need any underwater blasting acceptable. However, we note that if Islander East does determine if blasting is required, the Commission, the COE, and the appropriate state agencies will revisit that issue at that time and it will be subject to further review.

184. The EPA questioned whether the spacing of the samples for the offshore sediment sampling, discussed on page 3-43 of the final EIS would adequately represent the sediment chemistry of the Long Island Sound and questioned why BETX (benzene, toluene, ethylbenzene, and xylene) samples were conducted for New York and not Connecticut. Regarding the adequacy of sampling spacing, Islander East contacted the New York State Department of Environmental Conservation, Connecticut DEP, and COE to develop its offshore sediment sampling plan. Islander East states in its December 11, 2002 filing that no requests for changes were received from these agencies. An environmental condition was included that Islander East should file the sediment sampling data with the appropriate agencies for comments. Due to the very low levels of contaminants found in the samples and the fact that no concerns were raised in

response to the draft EIS or the final EIS concerning the need for additional sampling, the Commission believes that the spacing of the samples was adequate.

185. Concerning EPA's question about BETX sampling, Islander East states that a BETX analysis was required by the New York State Department of Environmental Conservation, whereas the Connecticut DEP does not normally require this analysis unless there is a specific reason to expect these compounds to be present, such as a dredged disposal area or known spill location, neither of which would be crossed.

186. The EPA requests a detailed cross section of the HDD exit basin. The detailed cross section of the HDD exit basin can be found in Islander East's April 1, 2002 filing, tab 23, in a report entitled "Marine Pipeline Installation Methodology." The EPA requests more information concerning the proposed biocide and the conditions under which it is proposed to be discharged. Specific information concerning the THPS-based biocide that would be used in the hydrostatic test water for the Long Island Sound was filed by Islander East on April 30, 2002, tab 10. The filing includes a letter to the New York State Department of Environmental Conservation that provides product data, the material safety data sheet, and neutralization and toxicity data for the biocide.

187. The EPA states that the analysis of blasting of the Muddy River does not describe why other less environmentally damaging alternatives are not practical. Due to the steep, rocky topography in the area, alternative crossing techniques, such as ripping or hammering, would disturb the area for a longer period of time, resulting in greater environmental disturbances. Discussion of the Muddy River is located on page 3-35 of the final EIS, and in greater detail in Islander East's April 1, 2002 filing, tab 13. The filing responds to the Connecticut Siting Council's request for information on the crossing and includes a photo alignment sheet, topographic profile, and Muddy River's location relative to the adjacent Mill Road. Islander East provides additional information concerning the Muddy River and other issues raised by the EPA in its December 11 filing. We find Islander East's responses acceptable.

The Commission orders:

(A) The requests for rehearing are granted in part, and denied in part as discussed above.

(B) The Connecticut DEP Commission's motion to intervene out-of-time is denied.

(C) Islander East's motion to file an answer is granted.

(D) The Connecticut AG's motion for a stay is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.